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# **This Property's Mine; or The Point Missed Entirely?**

## **The Coevolution of Copyright and Technological Protection Measures: A Framework for Analysis**

Through the location of the mechanisms and forms that support our current state of being, I seek to illustrate imbalances in legal scholarship pertaining to Technological Protection Measures ('TPM'). In the process of this undertaking, a second intention can be ascertained, namely the inaugural formulation of an analytical framework that not only vitalises TPM scholarship, but other areas of the law grappling with the same technological problems posed by late modernity. This framework is ultimately described as Deleuzo-Foucauldian, emanating from the critical theories of Gilles Deleuze and Michel Foucault and a subset of academics that have either made similar observations, or elaborated on their legacies. After introducing the central preoccupation of this thesis in chapter one, chapter two will outline the critical theories underpinning the Deleuzo-Foucauldian framework I wish to advocate. In chapter three I describe the historical evolution of TPM, and illustrate how the general academic perception that TPM are a distinctly late-modern phenomenon is an illusory myth. Advocating that we undertake the writing of a Foucauldian 'genealogy' of TPM, in this process, will enable us to observe the contingencies that have brought about changes in copyright law and technological development and to observe power relations and diagrammatic shifts that have rendered a correlative evolution of copyright and technology problematic. In chapter four I attend to a strict legal analysis of the law on books, redressing what I perceive to be a predominantly US-centric approach to legal academia pertaining to TPM and copyright, drawing an analysis between US and European legislation. In chapter five I discuss the peculiar relationship of the role of law, with respect to those seeking to pursue legitimate fair use rights or permitted exceptions to copyright prevented by TPM. I also address oft-overlooked rhetorical tropes pertaining to IP generally, and TPM specifically. Finally, in chapter six I offer a conclusion.



**Christopher Lever:** Durham University - Master of Jurisprudence - 2008

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**11 MAY 2009**

# Acknowledgements

I would like to acknowledge the help and support of my supervisors and colleagues at Durham University - for the invaluable conversations - that have helped me develop the ideas presented in this thesis, namely Professor David Campbell, Dr. Mike Adcock, and Daniel Turner.

What interests me isn't the law or laws (the former being an empty notion, the latter uncritical notions), nor even law or rights, but jurisprudence. It's jurisprudence, ultimately, that creates law, and we mustn't go on leaving this to judges.

(Deleuze 1995:169)

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# 1 Introduction

## This Property's Mine; or The Point Missed Entirely?

There has never been a time in our history when more of our 'culture' was as 'owned' as it is now. And yet there has never been a time when the concentration of power to control the uses of culture has been as unquestioningly accepted as it is now.

(Lessig 2004:12)

The central preoccupation of this thesis is a call to redress an *imbalance* in legal scholarship pertaining to Technological Protection Measures ('TPM'). In our haste to respond to the 'law on the books' academia has run with a kind of - often unrecognised - legal<sup>1</sup> and technological<sup>2</sup> determinism that infects many critical analyses of the legal environment of our digital future. As a result of this, critics have overwhelmingly presumed that the primary battlefields of technology and law are legislatures, global law-making bodies and courts (Bowrey 2005:140). Bowrey's motivation for drawing our attention to this imbalance could not be clearer. As the title of her book *Law and Internet Cultures* attests, 'there are various 'cultural' approaches to law' (Bowrey, 2005:17) that have been inadequately addressed in our critical analyses of copyright and technology. From this we can infer a necessity to not only broaden our legal analysis of technology

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<sup>1</sup> Scholarship pertaining to copyright and technology is not only 'legally deterministic' when too close an analysis is paid to the interpretation of the law on books, but where 'the emotional content of the text is...[a] fear of legal obedience - that there will be a crossing over from widespread non-compliance to social acceptance of the 'Say Yes to Copyright' message is the current subtext of much writing' (Bowrey 2005:141).

<sup>2</sup> Technological determinism, on the other hand, can be summarised as 'a view of society that assumes a major determining role for technology' (May 2002:13) that 'assumes some level of autonomy for technological developments...denies the significant political economic underpinnings of any particular technological change...[and] suggests such changes are outside the control of the societies in which they appear' (May 2007b:8). 'By taking changes in technology as the most important single factor in explaining any particular change in society, technological determinists deny (or ignore) the role of social and political choice' (May 2002:24).



and copyright through the investigation of 'cultural approaches' and 'consumption practices', but an overarching imperative to locate them within the 'bigger picture' of our current 'global condition'. 'Whatever term you want to use to describe the global condition we are now in - postmodernism<sup>3</sup>, information capitalism, the network economy, Empire<sup>4</sup>' - the question we must ask from the onset is 'what are the cultural mechanisms or forms of social control that support this state of being?' (Bowrey 2005:141).

It is through attending to this challenge – the location of the mechanisms and forms that support our current state of being, without being legally and technologically deterministic – that I seek to illustrate imbalances in legal scholarship pertaining to TPM. In the process of this undertaking, a second intention can be ascertained, namely the inaugural formulation of an analytical framework that not only vitalises TPM scholarship, but other areas of the law grappling with the same technological problems posed by late modernity. This framework is ultimately described as Deleuzo-Foucauldian, emanating from the critical theories of Gilles Deleuze and Michel Foucault and a subset of academics that have either made similar observations, or elaborated on their legacies. Whilst I will expound the rationality and importance of this framework in chapter two, and the intricacies of TPM in chapter three: an initial introduction to the erudition of Deleuze and Foucault; and an explanation of what TPM are, and how they have historically developed, will now be offered.

Every society has its diagram(s).

(Deleuze 1999:31)

In seeking to root out the mechanisms and forms of late modernity I am indebted to the work of Deleuze and Foucault. From a combination of their work three distinct diagrams emerge to explain the complexity of three different societal periods. Whilst the aspects of their theorisation pertinent to this thesis will be fully explained in the following chapter, it is important to initially visualise the three diagrams of which I will later speak.

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<sup>3</sup> It is submitted that the author prefers late modernity to post-modernity. 'Rather than entering a period of post-modernity, we are moving into one in which the consequences of modernity are becoming more radicalised and universalised than ever before. Beyond modernity...we can perceive the contours of a new and different order, which is 'post-modern'; but...distinct from what is at the moment called by many 'post-modernity' (Giddens 1990:3). In order to prevent this titular concern detracting from the arguments raised in this thesis I will hereafter refer to our 'post-modern' order as late-modern.

<sup>4</sup> A reference to the work of Hardt & Negri, which will be introduced and investigated further in this thesis.

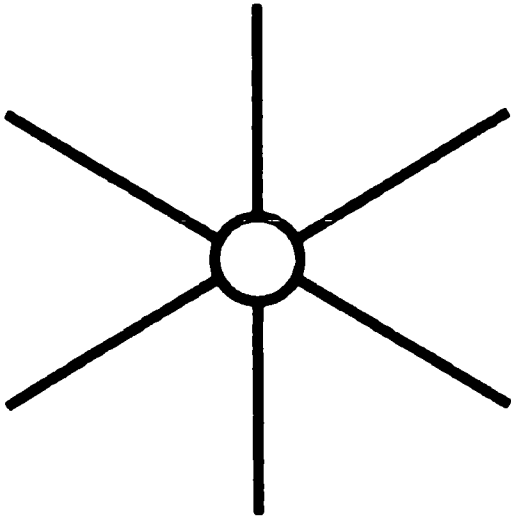


Figure 1.1 – Centralised – Sovereign

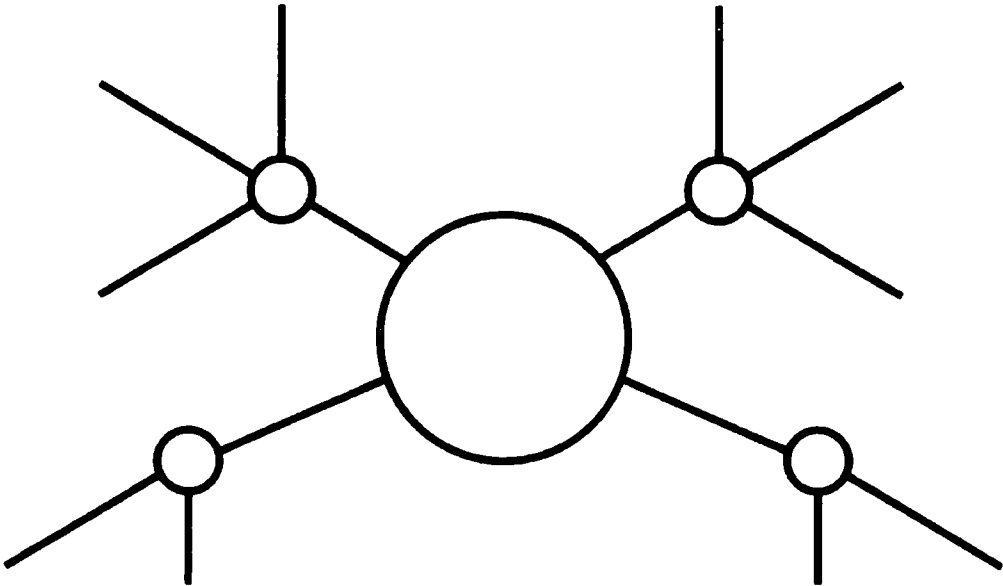


Figure 1.2 – Decentralised – Disciplinary

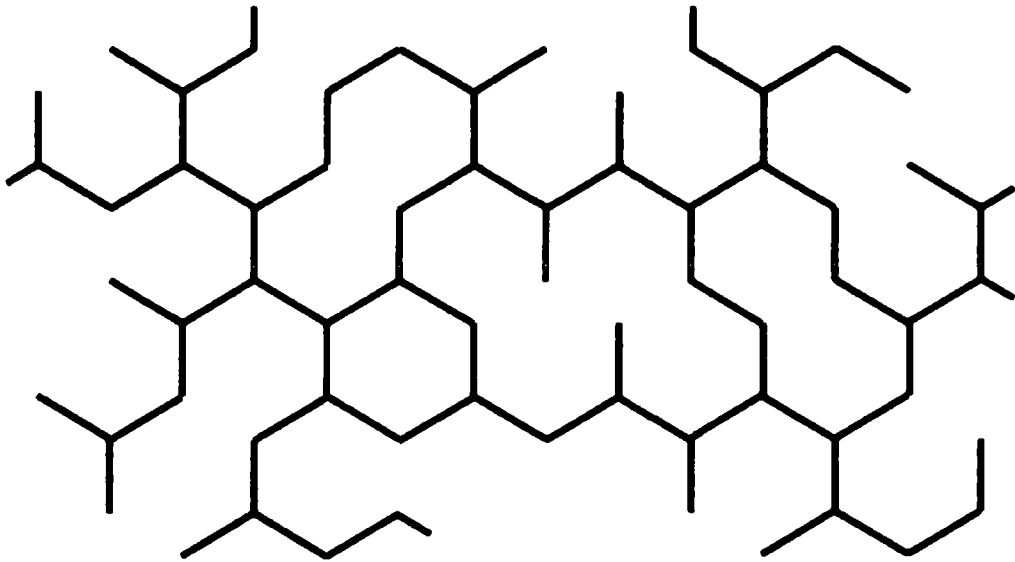


Figure 1.3 – Distributed – Control/Foucault's 'Third Technology of Power'

The final diagram is the most important, as it is not only illustrative of the diagram that best represents our movement towards late modernity, but one the author hopes has already been brought to our attention by Manuel Castells' seminal work on our current 'network society'. It is also integral to our understanding of one of Deleuze (& Guattari's) most poignant observations:

We're tired of trees. We should stop believing in trees, roots, and radicles. They've made us suffer too much. All of arborescent culture is founded on them, from biology to linguistics. Nothing is beautiful or loving or political aside from underground stems and aerial roots, adventitious growths and rhizomes.

(Deleuze & Guattari 2004:15)

In our haste to respond to the law on the books (already a mammoth undertaking under New Labour) we become so engrossed in the challenge, and the minutiae of legislation, that we cannot see the *roots* for the *trees*. Imagine governments, the judiciary, even legislation as hierarchical 'trees' with capillary roots that permeate the depths of society. Our new network society is more fluid and fluctuating, like a rhizome beneath the surface. Our computers and the Internet enable us to randomly traverse this distributed diagram, not only freely between the tree roots, but very often in blissful ignorance of the trees towering above.

The problems we are facing, therefore, can be viewed as the result of what Hardt and Negri call a 'hybrid topography' – a tension between two different diagrams. To avoid being legally and technologically deterministic we have to take this tension as the starting point of our analyses. If we focus too closely on one or the other, the fullest potential of our critical undertakings are lost. It would therefore, be a fair assertion to state that this thesis is primarily concerned with *control* of digitised copyright content (not only in it's common parlance, but with specific reference to Deleuze's neologism 'Control') and how TPM can also be observed as a Foucauldian 'technology of power'

Compared to other areas of critical analysis in this realm, conventional legal analysis appears to be the last discipline to 'catch on'. Critical theorists, sociologists, criminologists, technologists, conventional and political economists, and even marketing strategists have all been grappling with these diagrams for some time, yet TPM scholars have been largely silent on this bigger picture, and our courts are only beginning to observe the tension between these two diagrams pertaining to copyright generally (e.g. the distinction drawn between Napster which had a degree of decentralization, and the fully-distributed nature of the BitTorrent protocol).

So, what exactly are TPM, and how have they historically developed? The name itself, is specifically derived from the inaugural reference to protection against the circumvention of effective technological measures in The World Intellectual Property Organization ('WIPO') Copyright Treaty ('WCT')<sup>5</sup> (and the WIPO Performances and Phonograms Treaty ('WPPT')<sup>6</sup> and concomitant anti-circumvention legislation.

This legislative origin, undoubtedly, gives the layman the impression that TPM are primarily concerned with the protection of digitised content. To this end, one could quite adequately describe TPM as technological fences erected by copyright rightholders to protect their Intellectual Property ('IP') from the perceived inefficiencies of the Internet, and the omnipresent threat of rapacious 'pirates'.

Furthermore, the legislation-specific term TPM, has been, without specific origin, almost entirely supplanted in common parlance by the acronym 'DRM' (which more often than not, stands for 'Digital Rights Management'), rhetorically bolstering the belief that such measures are novel phenomena pertaining to digitised content.

It is submitted that both this thesis, and the overarching analytical framework it advocates, will refer to TPM instead of DRM for two reasons. Primarily, the legislation-specific TPM retains an anti-circumvention legislation specific focus in circumventing the rhetorical pitfalls of DRM. Secondly, the term TPM, if understood correctly, does not present the damaging illusion that

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<sup>5</sup> Art.11 WCT.

<sup>6</sup> Art.18 WPPT.

technological control of copy-making acts is a new phenomenon, addressing a distinctively digital crisis.

As I will discuss further, in chapter three, the fundamental concept underpinning TPM is neither novel, nor exclusive to digitised content. The desire to employ a technology, in its most basic sense, to the task of preventing an unauthorised act of copy-making, can be traced back to 400-1200AD, whereby cumbersome, tangible locks and chains, physically applied to monastic manuscripts, mandated who could access and/or copy their content.

It should be noted from the onset that earlier, analogue technologies, such as vinyl records, C60 music cassettes, and VHS video cassettes were amongst the first to experiment with the technological protection of copyrighted content. Such a conceptualisation of TPM enables us to observe that the evolution of copyright and technology that either facilitates or limits the act of copying is correlative: 'Each new generation of protective technologies has spawned efforts to overcome or circumvent these controls. As the locks get better, so, too, do some of the lock-pickers' (Zittrain 2005:2).

With this borne in mind, we can observe a correlative proliferation in the number of TPM employed to protect digitised content, without presenting the underlying concept as a distinctly digital endeavour to overcome a distinctly digital dilemma. Examples, at this point in the thesis, are too numerous cite, though one of the most commonly recognised forms of digital TPM - analogous to an analogue predecessor - is the Content Scrambling System ('CSS') used to encrypt commercial DVDs, famously circumvented by the then 15 year-old Norwegian, 'DVD John', who created- and disseminated across the Internet - a 'DeCSS' code.

In the subsequent chapter I will outline the critical theories underpinning the Deleuzo-Foucauldian framework I wish to advocate. In chapter three I will describe the historical evolution of TPM, and further illustrate how the general academic perception that TPM are a distinctly late-modern phenomenon is an illusory myth. Advocating that we undertake the writing of a Foucauldian 'genealogy' of TPM, in this process, will enable us to observe the contingencies that have brought about changes in copyright law and technological development and to observe power relations and diagrammatic shifts that have rendered a correlative evolution of copyright and technology problematic. In chapter four I will attend to a strict legal analysis of the law on books, redressing what I perceive to be a predominantly US-centric imbalance in legal academia pertaining to TPM and copyright. Whilst it is accepted that through WIPO, TRIPS and Free Trade Acts the US model of anti-circumvention legislation has been globalised, I attempt to draw an analysis between US and European Legislation. In chapter five I will discuss the peculiar relationship posed by our current 'hybrid topography' for the role of law, with respect to those seeking to pursue legitimate fair use rights or permitted exceptions to copyright prevented by TPM. I will also address oft-overlooked rhetorical tropes pertaining to IP generally, and TPM specifically. Finally, in chapter six I will offer a conclusion.

## 2 From 'Tired of Trees' to 'Sowing Seeds'

### Deleuzian Reality Mechanisms & Foucault's Third 'Technology of Power'

We're moving toward control societies that no longer operate by confining people but through continuous control and instant communication

(Deleuze 1995:174)

...the new technology that is being established is addressed to a multiplicity of men, not to the extent that they are nothing more than their individual bodies, but to the extent that they form...a global mass that is affected by overall processes characteristic of birth, death, production, illness, *and so on...*

(Foucault 2003:242-243 *Emphasis Added*)

In this thesis, I frame the co-evolution of copyright law and TPM through a specific framework, and advocate the application of this framework to further analysis of other areas of law concerned with technology. Taking my cue from the somewhat obscure and oft-misunderstood, late career work of Gilles Deleuze, Michel Foucault, and William S. Burroughs, I take seriously a shift in power Deleuze describes as a shift from disciplinarity to 'Control'.

#### Deleuzian Reality Mechanisms

In a relatively overlooked essay, penned in May 1990, Gilles Deleuze articulated a prophetic vision: 'Control Societies are taking over from disciplinary societies' (Deleuze 1995:178). He reiterates this assertion in an interview with Antonio Negri in Spring 1990: 'We're moving toward control societies that no longer operate by confining people but through continuous control and instant communication' (Deleuze 1995:174). Elaborating on his neologism: "'Control" is the name proposed by Burroughs to characterize [sic] the new monster and Foucault sees it fast approaching' (Deleuze 1995:178).

Never before, it is submitted, has anyone spoken more accurately about the dizzying climax of the co-evolution of copyright law and TPM, brought about by the Internet and the digital revolution. The distillation of cultural capital into the universal communicative language of binary code has caused an unforeseen furore for an area of law that has historically concerned itself with copies. This is not to say copyright law is any different than it was before – it has always been concerned with the creation of copies – and has co-evolved with the advent of new technologies that facilitate the act of copying. What has changed over the years of copyright and technology's co-evolution, however, are the 'technologies of power' to which both have been subjected. The Internet and digital technology allow for perfect copies to be created, almost instantaneously, and at near-zero marginal cost. In defence of the Internet it is - by its very nature - inherent in its architecture. In light of this technology's propensity to facilitate more ubiquitous acts of copying than regulatory bodies can prevent, copyright-holders have sought to protect their cultural capital with computer code. Whereas it was previously impossible to 'micro-manage' every instance of copying in the analogue world, it is now, near-perfectly<sup>1</sup> possible to do so in the digital, with the added possibility of transforming each act of copying into one capable of exacting a financial 'micro-transaction'. As Deleuze was astute enough to observe in 1990, '[t]he digital language of control is made up of codes indicating whether access to some information should be allowed or denied' (Deleuze 1995:180). As I will discuss below, it is through further analysis of Deleuze's theory of a 'control society' that current debates pertaining to the interplay of TPM and copyright law, would be best framed. In effecting distributed 'ultra-rapid forms of apparently free-floating control' (Deleuze 1995:178) we might better refer to Digital Rights Management technologies as 'Deleuzian Reality Mechanisms.' Furthermore, if we really are 'tired of trees', and the Internet and other digital distribution networks are inherently rhizomic in structure, we might view the use of TPM as a tactic for planting hierarchical tree-like structures, aloft the distributed topography. As Michael Hardt and Antonio Negri have observed; '[t]his oligopolistic model is not a rhizome but a tree structure that subordinates all of the branches to the central root. The networks of the new information infrastructure are a hybrid of these two models (Hardt & Negri 2000:300). To this end, it is the intention of this thesis to investigate how centralised control of copyrighted content exists after decentralisation, and how, through the employment of TPM, we have moved towards Hardt & Negri's aforementioned hybrid topography. If the commonly-held belief is that the rhizomic structure of the Internet and other forms of digital distribution are 'tired of trees', then mine is a tale of those who are attempting to regain hierarchical control over distributed networks – a tale of those who have moved from tired of trees, to sowing seeds<sup>2</sup>.

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<sup>1</sup> It has become an Internet truism that whilst TPM are perfect in the policing of 99.9% of 'average' users - they are never perfect for the minutiae of skilled 'hackers' and MIT/Harvard/Stanford/Princeton cryptographers.

<sup>2</sup> This, it is submitted, is more than a titular metaphor illustrative of attempts to plant centralised, tree-like structures in distributed, rhizomic networks. One can also note that an end user has to be careful where he sows the seeds he has licenced (not bought) from Monsanto, in the event that they take root in such a

To best introduce this Deleuzian insight, one that takes its cue from the literary cachet of William S. Burroughs and the genealogical histories of Michel Foucault – a theory I will ultimately describe as ‘Deleuzo-Foucauldian’, emanating from the intersections of a Deleuze-Foucault axis – it would be prudent to commence with Deleuze’s inaugural formulation of ‘Control’ – located in his 1986 work on/entitled ‘Foucault’. Here, Deleuze asserts that ‘Foucault has often been treated as above all the thinker of confinement (the general hospital in *Madness and Civilization*, the prison in *Discipline and Punish*)’ (Deleuze 1999:36) but calls for us to recognise the latter ‘can be taken as continuing Foucault’s previous books as much as representing a decisive new step forward’ (Deleuze 1999:22) – ‘[H]e was actually one of the first to say that we’re moving away from disciplinary societies, we’ve already left them behind’ (Deleuze 1995:174). From the genealogical histories of Foucault, Deleuze – as one of an enlightened few – plucks not two, but three ‘technologies of power’: sovereign power, disciplinary power, and his own neologism, Control. As Foucault claimed, late in his career: ‘[W]e see something new emerging in the second half of the eighteenth century: a new technology of power, but this time it is not disciplinary’ (Foucault 2003:242-243) As Deleuze attests ‘such a misinterpretation prevents us from grasping his global project’ (Deleuze 1999:36).

Here I’m afraid we need to pause for a little definitional clarity regarding Deleuze’s problematic attestation of Foucault’s ‘global project.’ I am acutely aware, as hopefully you are too, that Foucault would not have regarded himself as an ‘overarching theorist’ – let alone a ‘global project-manager’ – but regarded himself as a genealogical historian; a true Nietzschean, opposed to evolutionist historical thought. ‘Foucault pursued historical inquiries into ‘minor’ practices for governing people and spaces used by state as well as by non-state institutions, thus shedding a new light on governance rather than generating an account of ‘the state’’ (Valverde 2007:160). Whilst this is an accurate description of Foucault’s listless pursuit for localised power-relations, it leads Marianna Valverde to a somewhat otiose conclusion. In striving to ensure we do not lose sight of Foucault’s genealogical methodology she asserts: ‘In reading and using these texts, it is important constantly to keep in mind that Foucault does not provide theories’ (Valverde 2007:177). Whilst I find Foucault’s investigation of localised power-relations irreconcilable with Deleuze’s perception of a ‘global project’, I have no qualms with calling Foucault a theorist. In ‘Intellectuals and Power’<sup>3</sup> – a 1972 conversation between both thinkers – Foucault does not reproach Deleuze – as Valverde would have us believe – for describing his early work as a

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manner that enables a centralised, tree-like Control of IP. See: e.g. (Perelman 2003b:309): ‘Perhaps the most ominous example of the enforcement of intellectual property came from a Canadian case in which a farmer was accused of ‘stealing’ Monsanto’s intellectual property by planting genetically engineered seeds. The farmer protested that he had not planted Monsanto’s seeds, although neighbors [sic] had. He assumed that pollen from their farms had drifted onto his property. The judge ruled that even though the court had no evidence to prove that the genetic material had not arrived accidentally, the farmer still had the obligation to police his fields to protect them from Monsanto’s intellectual property.’

<sup>3</sup> For a transcript of the conversation, see: <http://libcom.org/library/intellectuals-power-a-conversation-between-michel-foucault-and-gilles-deleuze> – Archived by WebCite® at <http://www.webcitation.org/5g34TxXgf>



'theoretical analysis of the context of confinement'. For Deleuze, 'It is in the nature of power to totalise and it is your [Foucault's] position, *and one I fully agree with*, that theory is by nature opposed to power.' Given that Foucault's genealogical enquiries seek to root out the contingent diagrams of power-relations, where they are at their most invisible and insidious, by Deleuze's own definition, he is most certainly worthy of the grandiose title 'theorist'. As this methodological aside should testify - in positing a Deleuzo-Foucauldian framework for analysis - it is my intention to not only make use of their independent theorisation, but to emphasise the 'blind zones' in which encounters between these independent thinkers occur, and the mutual admiration of their respective contributions to critical theory<sup>4</sup>. Before presenting the parameters of the Deleuzo-Foucauldian framework, however, it is pertinent to first discuss the contributions made to Deleuze's societies of 'Control', by Burroughs and Foucault.

### **'Control' - Burroughs' *Monstre Froid*<sup>5</sup>**

'Control' is the name proposed by Burroughs to characterize [sic] the new monster and Foucault sees it fast approaching.

(Deleuze 1995:178)

Who, then, needs to control others but those who protect by such control a position of relative advantage?

(Burroughs 1985:118)

As early as 1971 Burroughs spoke of controlled communication: 'the potential of thousands of people with recorders' (Burroughs 2001:19) – *An Electronic Revolution* brought about by early wartime encryption technology foresaw 'the human body and nervous system as unscrambling devices' (Burroughs 2001:24) of 'messages passed along like signal drums' (Burroughs 2001:19) – dying in 1997, before he had a chance to fully realise the giant distributed network of binary drum signals we call the Internet. For Burroughs, 'Electronic Revolution' served more than 'the original purpose of scrambling devices...to make the message unintelligible...Another use for speech scramblers could be to impose thought control on a mass scale...when the human nervous system unscrambles a scrambled message this will seem to the subject like his very own ideas which just occurred to him' (Burroughs 2001:24). It might prove

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<sup>4</sup> When Foucault died in 1984, Deleuze paid him the honour of dedicating a book to the study of his work, whilst Foucault made occasional reference to the uniqueness of Deleuze's contributions to critical thought: Foucault remarks in 'Theatrum Philosophicum' 'perhaps one day this century will be known as Deleuzian' (Foucault 1977b:165), and in the first of 'Two Lectures' refers to 'the efficacy of...[Deleuze's] *L'Anti-Oedipe*, which really has no other source of reference than its own prodigious theoretical inventiveness' (Foucault 1976:80).

<sup>5</sup> (Foucault 1979:103).

somewhat hasty to write Burroughs off as a drug-addled paranoiac, when you realise that he, quite independent of Foucault's observations, articulates his third technology of power – a technology of power which could best be described as somewhat Orwellian – 'Who controls the present controls the past; who controls the past controls the future' (Orwell 1949:248) – with an additional arsenal of (subjectification) 'techniques which if fully exploited could make Orwell's 1984 seem like a benevolent utopia' (Burroughs 1985:116). Burroughs was, of course, in a beneficial position to proffer commentary on emerging technological trends, owing to his grandfather, William Seward Burroughs I, founder of the Burroughs Adding Machine Company, which later evolved into the Burroughs Corporation – often referred to as one of IBM's 'Seven Dwarfs'<sup>6</sup> – before merging with Sperry Corporation in 1986 to form UNISYS<sup>7</sup>

Somewhere between his time spent as a graduate student of anthropology at Harvard, and an outlaw in Mexico<sup>8</sup> he began to turn his theorisation towards a genealogy of 'Control,' the origins of which he attributes to the hieroglyphic language of ancient Egyptian and Mayan<sup>9</sup> civilisations:

The ancient Mayans possessed one of the most precise and hermetic control calendars<sup>10</sup> ever used on this planet, a calendar that in effect controlled what the populace did, thought, and felt on any given day. A study of this model system throws light on modern methods of control. Knowledge of the calendar was the monopoly of a priestly caste who maintained their position with minimal police force and military force.

(Burroughs 1970:313)

'In the Mayan control system, where the priests kept the all-important books of seasons and gods, the calendar was predicated on the illiteracy of the workers,' whereas 'modern control systems are predicated on universal literacy' (Burroughs 1985:117).

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<sup>6</sup> Burroughs Corporation was one of the eight major United States computer companies (with IBM, the largest, Honeywell, NCR Corporation, Control Data Corporation, General Electric, RCA and UNIVAC) through most of the 1960s. IBM's share of the market at the time was so much larger than all of the others, that this group was often sarcastically referred to as 'IBM and the Seven Dwarfs' ([http://en.wikipedia.org/wiki/Burroughs\\_Corporation](http://en.wikipedia.org/wiki/Burroughs_Corporation) - Archived by WebCite® at <http://www.webcitation.org/5g38WI9Ft>).

<sup>7</sup> Who you may recall, were responsible for a major IP controversy in 1994 in enforcing its patent on the LZW data compression algorithm, commonly used in the GIF image file format (<http://en.wikipedia.org/wiki/Unisys> - Archived by WebCite® at <http://www.webcitation.org/5g38gzF3x>).

<sup>8</sup> Burroughs was arrested after police searched his home and found letters between him and Allen Ginsberg referring to a possible delivery of marijuana. Burroughs fled to Mexico to escape possible detention in Louisiana's Angola state prison. Burroughs planned to stay in Mexico for at least five years, the length of his charge's statute of limitations. Burroughs also attended classes at Mexico City College in 1950 in Spanish, "Mexican picture writing" and codices, and the Mayan language ([http://en.wikipedia.org/wiki/William\\_S.\\_Burroughs](http://en.wikipedia.org/wiki/William_S._Burroughs) - Archived by WebCite® at <http://www.webcitation.org/5g38ngKKN>).

<sup>9</sup> See: (Burroughs 1961:193-199; 1969:289-293; 1970:313-319; 1985:116-120; and 2001:50-52)

<sup>10</sup> The Mayan calendar starts from a mythical date 5 Ahua 8 Cumhu and rolls on to the end of the world, also a definite date depicted on the codices as a God pouring water on the earth (Burroughs 1961:194).

As Deleuze seeks to inform us; 'The quest for 'universals of communication' ought to make us shudder' (Deleuze 1995:175) from which we can clearly infer a further, albeit implicit, reference to Burroughs: 'Universal literacy with a concomitant control of word and image is now the instrument of control' (Burroughs 1969:289).

As we shall ultimately observe, TPM, as well as Foucault's third 'technology of power', and Deleuze's 'Control' all operate in a manner foreseen by Burroughs, through the control of words and unilateral communication, that operate 'on a statistical basis' (Burroughs 1970:317), and 'conjure up phantom interrogators who invade and destroy your inner freedom' (Burroughs 1969:293).

### **Foucault's Third 'Technology of Power'**

Q: 'Isn't it logical, given these concerns, that you should be writing a genealogy of bio-power?'

Foucault: 'I have no time for that now but, it could be done. In fact, I have to do it.'

(Rabinow & Rose 2003:1)

What is Foucault trying to say in the best pages of *The History of Sexuality*? When the diagram of power abandons the model of sovereignty in favour of a disciplinary model, when it becomes the 'bio-power' or 'bio-politics' of populations, controlling and administering life, it is indeed life that emerges as the new object of power.

(Deleuze 1999:76)

We must reconcile from the onset the fact that Foucault was unfortunately, not afforded the opportunity - before his death - to fully theorise his third 'technology of power', initially referring to this third political technology as 'Biopower' and 'Biopolitics', only to later re-title his theorisations as 'Apparatuses of Security' and 'Governmentality'. Despite their uptake by various contemporary theorists, the themes he presents are not developed as a stand-alone notion at any great length by Foucault (Golder 2007:160). Every year, from his election to the position of Professor of the Collège de France in 1970, until 1982, Foucault delivered a course of lectures<sup>11</sup> open to the general public (with the exception of a 1977 sabbatical). The express intention of these lecture courses was for Collège Professors to 'report' on the progress of their current research projects. As a result, the published lecture courses exhibit a certain experimental, pleasingly unfinished quality; what we read is Foucault submitting to a

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<sup>11</sup> An account of the lecture course can be found in (Burchell et al. 1991:1-51). The chronology can be briefly summarised as 'Society Must Be Defended' ('SMD'), followed by, 'Security, Territory, Population' ('STP'), followed by 'The Birth of Bio-Politics' ('TBB') after (Rabinow 1997:73-79).

room of budding acolytes the tentative conclusions and seductive hypotheses of a 'work in progress' (Golder 2007:157-158). Frequently they supplement and contextualise some of the better-known formulations which appear in his books, lectures and interviews; and, more interestingly, in places they present examples of Foucault revising or contradicting some of the views expressed in his published work (Golder 2007:158). For example, the process of subjectification through the 'extract[ion] and produc[tion of] a truth which binds one to the person who directs one's conscience'<sup>12</sup> is a theme pursued relentlessly by Foucault in his later work (Golder 2007:173) - a pursuit Véronique Voruz<sup>13</sup> observes as a pressing reformulation of his theorisation of discourse, rendered problematic by Deleuze's 'process of subjectification'<sup>14</sup>.

One thing we can be relatively certain about is that Foucault is attempting to articulate a distinct, third 'technology of power', one differing substantially from Sovereignty and Disciplinarity. In the closing pages of *The History of Sexuality, Vol 1*, Foucault incorporates his account of disciplinary power into a more general concept: 'biopower', or, the 'power over life'<sup>15</sup> (Baxter 1996:456). In *SMD* Foucault traces the development of this discourse, with its various deployments and reworkings, up through the twentieth century. Culminating in its concluding discussion of bio-power, there is noticeable overlap with several central concerns from *The History of Sexuality, Vol.1*, and we can see Foucault in this period moving beyond the analysis of social relations in terms of institutional mechanisms of discipline to a wider analysis of bio-power (Golder 2007:159). This is a point Foucault unequivocally endorses in interview in 1978 - published under the title *The Crisis of Disciplinary Society*<sup>16</sup> - stating that it now appears "obvious that we have to say good-bye to the disciplinary society such as it exists today"<sup>17</sup> (Lemke 2005c:6-7).

Asked shortly before his death: 'Isn't it logical, given these concerns, that you should be writing a genealogy of bio-power?', Foucault replied: 'I have no time for that now but, it could be done. In fact, I have to do it' (Rabinow & Rose 2003:1). Attending to this remains an imperative for the future - *it has to be done*. It is to this imperative obligation, and a reconciliation of Foucault's partial communication of a fully-fledged theorisation I now turn.

<sup>12</sup> (Foucault 2007:183) cited in (Golder 2007:173).

<sup>13</sup> It is, for example, arguable that Foucault fails fully to account for the constitution of the subject in discourse, and that it is this failure which, in turn, leads him to reintroduce something of the subject in the last period of his research, though in the guise of what Deleuze has termed 'processes of subjectivation' (Voruz 2005:156,n.1).

<sup>14</sup> (Deleuze 1995:118).

<sup>15</sup> (Foucault 1990:139-40).

<sup>16</sup> (Foucault 2004:533).

<sup>17</sup> To preclude a possible misunderstanding: According to Foucault, discipline is a technology of power that works in very different social formations and historical epochs. He concentrated in his texts on the analysis of processes of disciplination from the 17<sup>th</sup> to the 19<sup>th</sup> century, but also stressed their importance for fascist, 'actually existing socialist' and liberal-democratic regimes in the 20<sup>th</sup> century. In this perspective there is no absolute break between disciplinary and post-disciplinary societies and the transition to postfordism does by no means imply a disappearance of disciplinary forms of regulation. (Lemke 2005c:6-7n.xii).

### ***Biopower/Biopolitics***

So what is Foucault trying to say in the best pages of *The History of Sexuality, Vol.1*? When the diagram of power abandons the models of sovereignty and disciplinarity? When it becomes the 'biopower' or 'biopolitics' of populations, controlling and administering life? As Rabinow & Rose contend: '[m]ore than quarter of a century after the introduction of this concept, at the threshold of what some have plausibly termed 'the biological century,'...surprisingly little work has been done to develop Foucault's own sketchy suggestions into an operational set of tools for critical inquiry' (Rabinow & Rose 2003:3). As they lament further: '[t]he term biopower is more likely to be taken to refer to the generation of energy from renewable biological material'<sup>18</sup>, and that '[t]he term biopolitics has been taken up by advocates of a range of environmental and ecological causes' (Rabinow & Rose 2003:3). Thomas Lemke also attests to a 'simultaneous generalisation and depoliticisation'<sup>19</sup> of biopolitics<sup>20</sup>.

Recalling Foucault's earlier appreciation of biopower and biopolitics; '[A]fter a first seizure of power over the body in an individualizing [sic] mode, we have a second seizure of power that is not individualizing [sic] but, if you like, massifying' (Foucault 2003:242-243). Foucault's work, however, focuses only indirectly upon the description of these new biopowers<sup>21</sup>, and it is therefore illustrative to turn to the views of others. For Lazzarato, biopolitics is the form of government taken by a *new dynamic of forces* that, in conjunction, express power relations that the classical world could not have known (Lazzarato 2002:101) - it is not the pure and simple capacity to legislate or legitimize [sic] sovereignty (Lazzarato 2002:103). It is, we should recall, a distinct third - a technology of power, that operates through individuals and populations. As Rabinow and Rose submit; 'the concept of biopower is pertinent to grasping many diverse contemporary developments' (Rabinow & Rose, 2003:35), yet; despite its popularisation by Giorgio Agamben<sup>22</sup> the theme of bio-politics or the bio-political is really not developed as a stand-alone notion at any great length by Foucault (Golder 2007:160). Whilst Timothy O'Leary argues that biopower is 'conceptually...included in the concept of governmentality' (O'Leary 2002:178), it is submitted, with support from Golder, that biopower/biopolitics could be best described as Foucault's initial thematisation of his third 'technology of power' - a point from

<sup>18</sup> This certainly appears to be the case: A simple 'Google search' for 'biopower' will yield more pages pertaining to SAAB's new engine than Foucault's erudition.

<sup>19</sup> (Lemke 2005a:2).

<sup>20</sup> Today, the term 'biopolitics' is used more and more frequently in scientific literature and journalistic texts. Mostly it is employed as a neutral notion or a general category to point out the social and political implications of biotechnological interventions. This technology centred approach ignores the historical and critical dimension of the Foucauldian notion, how technological developments are embedded in more global economic strategies and political rationalities (Lemke 2005a:1-2).

<sup>21</sup> ...If power seizes life as the object of its exercise then Foucault is interested in determining what there is in life that resists, and that, in resisting this power, creates forms of subjectification and forms of life that escape its control (Lazzarato 2002:100).

<sup>22</sup> It will suffice to say, Agamben's deployment of the concept (Agamben 1998:3-6,9,20,87,111,119-21,187) differs markedly from Foucault's (Golder 2007:160,n.7).

which he 'went in search of more historically and socially refined categories, of which governmentality and apparatuses of security represent the first examples' (Golder 2007:160,n.8).

Of great relevance to this thesis is the distinctively Deleuzo-Foucauldian 'take' on biopower/biopolitics we can find in Michael Hardt and Antonio Negri's *Empire*, who state, 'biopower is another name for the real subsumption of society under capital'<sup>23</sup> (Hardt & Negri 2000:364-365) – a 'form of power that regulates social life from its interior' (Hardt & Negri 2000:23) – whilst biopolitics refers to a power that is 'expressed as a control that extends throughout the depths of the consciousnesses and bodies of the population' (Hardt & Negri 2000:24). For Hardt & Negri, 'biopower is an encompassing, totalizing [sic] term...Since, for them, this characterizes [sic] all power, all contemporary politics become biopolitics' (Rabinow & Rose 2003:5). 'By synthesizing ideas from Italian neo-operatism, with poststructural and Marxist theories, as well as with Deleuzian vitalism, they claim that the borderline between economics and politics, reproduction and production is dissolving. Biopolitics signals a new era of capitalist production where life is no longer...subordinated to the working process' (Lemke 2005a:2).

### *Sécurité*

Foucault's principal concern in the first three lectures of *STP* is to articulate the specificity of a biopower<sup>24</sup> he now calls 'apparatuses of security', and, more importantly, to distinguish them from the concept of discipline which he had developed in the preceding years.<sup>25</sup> According to Foucault, what defines a mechanism of security is neither that it prohibits (per law) nor that it prescribes (per discipline) (Golder 2007:162) but rather that it, 'possibly making use of some instruments of prescription and prohibition...respond[s] to a reality in such a way that this response cancels out the reality to which it responds - nullifies it, or limits, checks, or regulates it' (Foucault 2007:47). '[A]gainst discipline's interventionist regulation, apparatuses of security practice a laissez-faire and technocratic management of phenomena at the level of the population itself' (Golder 2007:164). As Foucault states, apparatuses of

<sup>23</sup> ...exercised in the name of multi-national and trans-national corporations who, since the second half of the twentieth century have chosen (Rabinow & Rose 2003:5) 'to structure global territories bio-politically' (Hardt & Negri 2000:31).

<sup>24</sup> The thematic of bio-power is of course taken up in *STP*, although as we shall see it is very quickly subordinated to the more precise investigation of 'governmentality' and apparatuses of security. This downgrading of the explicit theme of the bio-political is again practiced in the lecture course immediately postdating *STP*. In *TBB*, Foucault moves beyond the titular concern with bio-politics to the real subject of the lecture course, 'liberalism', understood in genealogical terms neither as a theory nor as an ideology, but rather as a practice, or as what Foucault might term a political technology (Golder 2007:159-160).

<sup>25</sup> Foucault does distinguish security mechanisms from disciplinary mechanisms in the final lecture of '*SMD*' (p. 246), but the concept of mechanisms of security is absent from *The History of Sexuality, Vol. 1*. It is thus in this lecture course that the distinction is made in its clearest and most comprehensive terms (Golder 2007:162,n.15).

security function to induce 'a progressive self-cancellation of phenomena by the phenomena themselves. In a way, they involve the delimitation of phenomena within acceptable limits, rather than the imposition of a law [or a disciplinary norm<sup>26</sup>]' (Foucault 2007:66). This however is only a preamble to the flux of Foucault's thought – that 'which is first called 'security', and becomes 'governmentality'...in the fourth lecture' (Valverde, 2007:168).

### **Governmentality**

Foucault clarifies the link between what he has been calling apparatuses of security and what he now, in the fourth lecture<sup>27</sup>, introduces as governmentality; population is the 'target,' the political object of this new modality of power, while apparatuses of security are its 'essential technical instrument,' (Foucault 2007:108) or the technical means by which population is managed<sup>28</sup> (Golder 2007:164-165). Historicising this notion of population in his later work on governmentality<sup>29</sup>, from the sixteenth century onward, Foucault argues, political thinkers became increasingly aware that 'population has its own regularities, its own rate of deaths and diseases, its cycles of scarcity' and its own 'specific economic effects.'<sup>30</sup> Management of these problems required the creation of a distinctive form of rationality – an 'art of government' or '*raison d'état*' (Baxter 1996:457). While the word government today, arguably possesses only a political meaning, Foucault was able to show that up until the late 18<sup>th</sup> century the problem of government was placed in a more general<sup>31</sup> context – as a term discussed not only in political tracts, but also in philosophical, religious, medical and pedagogic texts (Lemke 2005b:2). He traces the development of this form of political rationality from its origins in antiquity and early Christianity, to the seventeenth-century cameralist police state, to early liberal society, and finally to contemporary neo-liberal trend<sup>32</sup>; ultimately describing this form of 'governmental rationality' - through his 'governmentality' neologism<sup>33</sup> - as a power over all and each that simultaneously individualizes [sic] and totalizes [sic]<sup>34</sup> (Baxter 1996:457).

<sup>26</sup> ...against discipline's interventionist regulation, apparatuses of security practice a laissez-faire and technocratic management of phenomena at the level of population itself (Golder 2007:1163-64).

<sup>27</sup> *STP* is primarily concerned with the genealogy of power relations, and more specifically with the genealogy of state institutions and practices. However, with the introduction of the concept of "governmentality," we can definitely see lineaments of Foucault's future thematization [sic] of the government of oneself and of others, which comes to dominate his ethical writings in the early 1980s (Golder 2007:161).

<sup>28</sup> In a triangle of 'security – population – government' (Foucault 2007:88).

<sup>29</sup> See Foucault: 'Governmentality' in (Burchell et al. 1991:99-101); see also Foucault: 'Omnes et Singulatim: Towards a Criticism of 'Political Reason' in (Sterling 1981:223).

<sup>30</sup> Foucault: 'Governmentality' in (Burchell et al. 1991:99).

<sup>31</sup> Drawing a distinction between the old notion of government (centered upon the actions of a sovereign ruling his territorial subjects through laws and edicts) (Golder 2007:164).

<sup>32</sup> See Foucault: 'Omnes et Singulatim: Towards a Criticism of Political Reason' (Sterling 1981:223).

<sup>33</sup> See (Lemke 2005b:2): 'The semantic linking of governing ('*gouverner*') and modes of thought ('*mentalité*') indicates that it is not possible to study the technologies of power without an analysis of the

Here we can best observe government as a continuum, which extends from political government right through to forms of self-regulation (Lemke 2005b:2). In this sense, governmentality is introduced by Foucault to study the 'autonomous' individual's capacity for self-control and how this is linked to forms of political rule and economic exploitation (Lemke 2005b:4). This theoretical stance allows for a more complex analysis of forms of government that feature not only direct intervention by means of empowered and specialized [sic] state apparatuses<sup>35</sup>, but also characteristically develop indirect techniques for leading and controlling individuals (Lemke 2005c:9) - the product of a re-coding of social mechanisms of exploitation and domination on the basis of a new topography of the social domain (Lemke 2005c:10). We need only look to the new topography of the Internet - that great distributed network of networks - to see the most blatant use of code as 'Control'. As Foucault wrote in 1982, 'governmentality' is nothing other than the 'encounter between the technologies of domination of others and those of the self'<sup>36</sup>.

### ***Ships of State***

In asserting that '[o]ne governs things' (Foucault 1979:93), Foucault finds historical support for this notion of governmentality 'readily confirmed by the metaphor which is inevitably invoked in ...treatises on government, namely that of the ship' (Foucault 1979:93). After positing the question, 'what does it mean to govern a ship of state?' he asserts:

'It means clearly to take charge of the sailors, but also of the boat and its cargo; to take care of the ship means also to reckon with wind, rocks and storms; and it consists in that activity of establishing a relation between the sailors who are to be taken care of and the ship which is to be taken care of, and the cargo which is to be brought safely to port, and all those eventualities, like winds, rocks, storms and so on; this is what characterizes [sic] the government of a ship' (Foucault 1979:93-94)

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political rationality underpinning them. But there is a second aspect of equal importance. Foucault uses the notion of government in a comprehensive sense geared strongly to the older meaning of the term and adumbrating the close link between forms of power and processes of subjectification,' and, (Lemke 2005c:7-8): 'Foucault uses the concept of government in a comprehensive sense geared strongly to the older meaning. It refers to an art of directing people and includes the interaction of forms of knowledge, strategies of power, and modes of subjectification. With the neologism "governmentality", Foucault designated the distinct rationalities, forms of conduct, and fields of practice that aimed in diverse ways at the control of individuals and collectivities and likewise included forms of self-conduct like techniques of directing others. As a consequence, Foucault expanded his microphysics of power to social macrostructures and the phenomenon of the state.'

<sup>34</sup> See Foucault: 'Omnes et Singulatim: Towards a Criticism of Political Reason' (Sterling 1981:226-227); and Gordon: 'Government Rationality: An Introduction' (Gordon 1980:1-3).

<sup>35</sup> It is submitted that whilst TPM may not fit this description of an 'empowered and specialized [sic] state apparatus' they could easily be viewed as state-empowered specialist-apparatuses of security.

<sup>36</sup> See Foucault: 'Technologies of the Self' (Rabinow 1997:225).



What Foucault seeks to reveal, with the aid of this metaphor, is that government is not primarily concerned with sovereign territory, but rather, a complex imbrication of men and things (Foucault 1979:93). In this sense, it is submitted, as we shall observe further, that governmental approaches to the digital delivery of copyrighted material, are concerned with a complex imbrication of men and copyrighted material, in safeguarding their precious cargo – not only in the sense that it is likely to be looted by ‘pirates’ but in safeguarding its navigational path so as to save it from drifting unmanned across the Internet<sup>37</sup>.

To this end, John Perry Barlow – an advocate of what James Boyle has coined ‘the jurisprudence of digital libertarianism’ (Boyle 1997) – believes that ‘[s]ince we don’t have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitization [sic] of everything not obstinately physical, we are sailing into the future on a sinking ship’ (Perry Barlow 1993). Elaborating further on his ship of state’s unsuitability for the traversing the Internet he states:

‘This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as without. Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair rearrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal penalties, and serene, glassy-eyed denial’

(Perry Barlow 1993)

It is submitted however, as we shall observe, that our current governmental brigantine is well-adept at traversing treacherous waters. That whilst its ‘vaporous cargo’ may appear more susceptible to digital diffusion than active piracy, the natural law of the Internet has never been the uncontrolled utopia Perry Barlow presents it as<sup>38</sup>.

### ***Foucault’s Flock***

Foucault surmises that the historical foundations of present practices of state-based governmentality are partly to be found in the pre-Christian East, and later in the Christian East, in the model and organisation of pastoral power; characterised firstly, as a power exercised over a flock of people on the move rather than over a static territory, and secondly, by what Foucault terms the ‘paradox of the shepherd’ (Foucault 2007:129), namely, that the pastor must care for the multiplicity as a whole while at the same time providing for the particular salvation of each (Golder 2007:165). For Foucault, this prelude to governmentality presents ‘one of the decisive moments in the history of power in Western societies...through the constitution of a

<sup>37</sup> Like a modern-day ‘Marie Celeste’ – traversing the straits of peer-to-peer networks, if you will.

<sup>38</sup> See e.g. (Boyle 1997); (Galloway 2004); and (Galloway & Thacker 2007).

specific subject...whose merits are analytically identified, who is subjected in continuous networks of obedience'(Foucault 2007:185). Here, Foucault links this Christian hermeneutic derived from the modality of pastoral power to modern systems of governmentality: 'This is a technique of political individualization [sic] - the production and conduct of governable identities...that comes to assume great importance in the organization [sic] of Western political systems (Golder 2007:173-174).

Here, it is useful to refer to Deleuze's critique of Foucault's pastoral power in *Postscript on Control Societies*:

Disciplinary societies have two poles: signatures standing for *individuals*, and numbers or places in a register standing for their position in a *mass*. Disciplines see no incompatibility at all between these two aspects, and their power both amasses and individuates, that is, it fashions those over whom it's exerted into a body of people and molds the [179] individuality of each member of that body (Foucault saw the origin of this twin concern in the priest's pastoral power over his flock and over each separate animal, and saw civil power subsequently establishing itself by different means as a lay 'pastor'). In control societies, on the other hand, the key thing is no longer a signature or a number but a code...The digital language of control is made up of codes indicating whether access to some information should be allowed or denied. We're no longer dealing with a duality of mass and individual. Individuals become '*dividuals*,' and masses become samples, data, markets, or '*banks*.'

(Deleuze 1995:179-180)

This is not to say that Deleuze devalues Foucault's observation that the pastorate paved the way for a third 'technology of power', by locating it in disciplinarity, only that Deleuze sees the relationship between individuals and populations as different in societies of Control – as a complex imbrication of *dividuals* and *markets/(data) banks*. As Foucault's flock was broken into individual trackable and predictable sheep and then regrouped at will, the development of these tags opens the possibility of a more detailed and intimate control (Cameron 2004:142). To this end Deleuze seeks to show that within societies of Control the focus has shifted from the individual confession, to the predication of *dividual* risk-assessment – that '[s]ocieties of Control are not interested as much in the soul or what sins people have committed, but in behaviour and what future actions can be predicted' (Cameron 2004:140).

### ***Foucault's Economy***

For Foucault, governmentality is also 'essentially concerned with answering the question of how to introduce economy – that is to say, the correct manner of managing individuals, goods and wealth within the family (which a good father is expected to do

in relation to his wife, children and servants) and of making the family fortunes prosper — how are we to introduce this meticulous attention of the father towards his family into the management of the state?’ (Foucault 1979:92). As we shall further observe, it is the intention of this thesis to draw attention to the way the copyright industry<sup>39</sup>, in a similar vein, endeavours to afford the same ‘meticulous attention’ of the familial economy to the digital content they distribute, through the employment of TPM.

Foucault also observed, through the development of political economy, how techniques of power changed at the precise moment *economy* (strictly speaking, the government of the family) and *politics* (strictly speaking, the government of the polis) became imbricated (Lazzarato 2002:101). After historicising the governmental rationality behind the ‘meticulous attention’ of familial economy he found further support for governmentality in the neo-liberalism of the Chicago School of Economics<sup>40</sup>, where he observes an ‘attempt to develop a new political rationality that, beyond the critique of the welfare state, aimed to extend the economic form to the social’ (Lemke 2005c:8). In the shift from ‘classical’ liberalism to neo-liberalism Foucault observed ‘Sovereign techniques for governing the problem of bread prices, for instance, include rigid controls on what crops can be grown and what prices can be charged; [whereas] more ‘governmental’, liberal techniques developed in the early nineteenth century did not prohibit anything but rather incentivized [sic] certain economic activities’ (Foucault 2005:46-47). Unlike the state in the ‘classical’ liberal notion of rationality, for the neo-liberals the state does not define and monitor market freedom, for the market is itself the organising and regulative principle underlying the state. From this angle, it is more a case of the state being controlled by the market than of the market being supervised by the state (Lemke 2001:200).

Foucault suggests that the key element in the Chicago School’s approach is their consistent expansion of the economic form to apply to the social sphere (Lemke 2001:197). Whereas in the ‘classical’ liberal conception, *homo oeconomicus* forms an external limit and the inviolable core of governmental action, in the neo-liberal thought of the Chicago School he becomes a behaviouristically manipulable being and the correlative of a governmentality which systematically changes the variables of the ‘environment’ and can count on the ‘rational choice’ of the individuals (Lemke 2001:200). As we will later observe, the governmentality of the Internet certainly plays on the rational choice of individuals. Faced with permitted exceptions to copyright rendered ‘market failures now cured’ by the low cost of excludability through TPM, as we will also observe, these once-permitted exceptions to copyright are now capable of extracting micro-payments for use through the economic acquiescence of rational actors. However, the current governmentality of digital distribution presents a somewhat perverse relationship for the market failure analysis of the Chicago School, in ultimately regarding their ‘public goods’ market failure without merit. As Niva Elkin-Koren and Eli Salzberger observe: The public good market failure is central for Cyberspace, in which almost everything boils down to

<sup>39</sup> Very often, with their artists (rhetorically) in tow: ‘Dr Dre: Napster is taking food out of my kids’ mouths’ (McIver 2004:299).

<sup>40</sup> And in the German Ordo-Economics movement, which will not be discussed further in this thesis.

information, considered by traditional analysis as a public good (Elkin-Koren & Salzberger 2004:49). In seeking to ascertain why the 'public good' market failure has not been seen as 'corrected' by digitisation in the same way the 'excludability' market failure has been corrected, we might better observe this hypocrisy as a governmental rationality that is not the 'result of objective economic laws, but from the perspective of a transformation of social power relations' (Lemke 2005c:11).

### **Foucault's Expulsion of Law**

Foucault's failure to develop an adequate theory of law presents a problem for, but does not necessarily preclude his appropriation by, contemporary legal scholars.

(Baxter 1996:450)

'Applying' Foucault to law, particularly if it means inserting Foucauldian concepts into legal argument, requires caution (Baxter 1996:473). A strict, textual interpretation of Foucault's writing suggests - as Hunt & Wickham observe - that he appears to unequivocally 'expel law from any significant role'<sup>41</sup> in modernity. As Baxter asserts, the argument for this 'expulsion thesis' is remarkably simple (Baxter 1996:461). Firstly, we have the link Foucault consistently establishes between law, on one hand, and sovereignty and the 'juridical' conception of power, on the other<sup>42</sup> - portraying law as the sovereign's prohibitory command over an obedient subject, backed ultimately, by the sword. For Foucault, 'power law' is 'power-sovereignty.'<sup>43</sup> (Baxter 1996:461-462). Secondly, there is the fundamental opposition Foucault establishes between modern power relations and the sanction-backed command of sovereign power: '[T]he juridical system...is utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization [sic]...We have been engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, of sewing as its system of representation' (Foucault 1990:89)<sup>44</sup>. An understanding of modern power relations, Foucault contends, must 'no longer take law as a model and a code'; instead, we must 'cease to

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<sup>41</sup> (Hunt & Wickham 1994:34).

<sup>42</sup> (Hunt & Wickham 1994:40).

<sup>43</sup> (Foucault 1990:90).

<sup>44</sup> See also: '[W]e must break free of...the theoretical privilege of law and sovereignty...We must construct an analytics of power that no longer takes law as a model and code.' (Foucault 1990:90); and, '[W]e should direct our researches on the nature of power not towards the juridical edifice of sovereignty, the State apparatuses and the ideologies which accompany them, but towards domination and the material operators of power... We must escape from the limited field of juridical sovereignty and State institutions, and instead base our analysis of power on the study of the techniques and tactics of domination.' Foucault: Two Lectures in (Gordon 1980:102).

conceive' of power 'in terms of law, prohibition...and sovereignty'<sup>45</sup> (Baxter 1996:462), leading Baxter to ultimately conclude that by linking law to sovereignty, Foucault's analytics of power tends to expel law, and his historical analysis of disciplinary power confirms this expulsion (Baxter 1996:462).

It is submitted that Hart & Wickham's 'expulsion thesis' is problematic for two reasons. Firstly, as Beck attests, Foucault's 'analysis of legal phenomena in terms of force and institutions does not expel law' – his paramount concern is to 'analyse legal phenomena in different terms' (Beck 1996:496). The point is not to 'recover' Foucault's understanding of law but to see how a more adequate understanding of law might refocus Foucault's analysis of power in modern society (Simon 1992:50). As James Boyle illustrates, with a pertinently late-modern example; through current endeavours to 'embed' or 'hardwire' the 'legal regime' in the technology itself 'the exercise of power is much more a matter of the quotidian shaping and surveillance of activity than of imposing sanctions after the fact' (Boyle 1997). We should be looking to Foucault, in this sense, not because he 'expels law' from his analysis, but because his search for the loci of power-realtions provides a constructive counterpoint to the positivist approaches of Austin<sup>46</sup> and Hart<sup>47</sup>. As Boyle concludes; 'If the king's writ reaches only as far as the king's sword, then much of the content on the Net might be presumed to be free from the regulation of any particular sovereign' (Boyle 1997) – 'Indeed, if there was ever a model of law designed to fail at regulating the Net'<sup>48</sup>, it is the Austinian model' (Boyle 1997). Hunt and Wickham, however, do Foucault a grave injustice in equating his 'imperative conception of law,'<sup>49</sup> in which law is the sanction-backed command of the sovereign, with Austin's positivist notion of 'law as command of the sovereign,' (Baxter 1996:464). As Beck attests; 'The principal question in any exegesis of Foucault is about his notions of the relation between power and knowledge' (Beck 1996:498) – 'he could hardly have made clearer'<sup>50</sup> his aim in going behind legal discourse, to uncover the pressure of conflicting, agonistic, forces in society including the forces of law' (Beck 1996:496).

Secondly – as Hunt & Wickham observe – in other passages to the ones cited above, Foucault suggests a more complicated picture of modern law. Sometimes, rather than 'counterposing law and discipline,' Foucault 'draw[s] attention to the interaction and interdependence of disciplinary practices and their legal framework'<sup>51</sup>

<sup>45</sup> (Foucault 1990:90).

<sup>46</sup> 'When Netizens think of law, they tend to conjure up a positivist, even Austinian image; law is a command backed by threats, issued by a sovereign who acknowledges no superior, directed to a geographically defined population which renders that sovereign habitual obedience' (Boyle 1997).

<sup>47</sup> 'Hart's legal theory, based on rules, distinctively dilutes and obscures power' (Beck 1996:496).

<sup>48</sup> 'When viewed within the discourse of sovereignty, of the promulgation and enforcement of Austinian 'commands backed by threats' aimed at a defined territory and population, the Net does indeed look almost invulnerable' (Boyle 1997).

<sup>49</sup> (Hunt & Wickham 1994:59).

<sup>50</sup> See: Foucault 'Questions on Geography' in (Gordon 1980:72-73): 'I do not mean in any way to minimise the importance and effectiveness of State power. I simply feel that excessive insistence on its playing an exclusive role leads to the risk of overlooking all the mechanisms and effects of power which don't pass directly via the State apparatus'

<sup>51</sup> (Hunt & Wickham 1994:47).

(Baxter 1996:462-463). As Foucault reveals in *Discipline and Punish*: 'a system of rights...egalitarian in principle was supported by these tiny, everyday physical mechanisms, by all those systems of micropower that are essentially non-egalitarian...that we call the disciplines.'<sup>52</sup> Here, Foucault suggests that law and discipline are complementary, not fundamentally opposed (Baxter 1996:463). That disciplinary power, is a 'sort of counter-law'<sup>53</sup>. Hunt & Wickham, however, urge us not to make too much of this complementary relationship. As they contend, Foucault seems here to treat modern constitutionalism as merely an ideological form, a masking of 'real' and 'corporal' power with 'formal' and 'juridical' liberties<sup>54</sup> (Baxter 1996:463). The problem with this contention is that disciplinary power - such as that exercised by an employer - presupposes the legal playing-field pertaining to who may exercise such power and how they may exercise it.<sup>55</sup> It is not the case that Foucault argues that law is simply a mask; it is both a mask and a real source of power, at least of equal importance to the disciplines (Beck 1996:494). Law thus, does not simply rest atop the 'foundation' of disciplinary power; it helps constitute it (Baxter 1996:463).

To a larger, and more pressing extent, it is imperative that we do not dwell too much on Foucault's alleged expulsion or codependence of law pertaining to disciplinarity. As we have already observed in this chapter, disciplines are only part of the picture, of which state law is another.<sup>56</sup> As Valverde testifies; 'In borrowing and adapting Foucault's work, we will have to strive to be as keenly aware of our own intellectual-political context as Foucault was of his' (Valverde 2007:177). Given that Foucault's initial formulations of governmentality are only beginning to percolate into academic scholarship, in Judith Butler's most recent book *Precarious Life: The Powers of Mourning and Violence* we find a surprisingly novel take on the relationship between Foucault's third 'technology of power' and the rule of law. In a truly Foucauldian analysis of various forms of 'indefinite detention' brought about by the 'war on terror' Butler offers us a compelling view on the triangle of sovereignty-law-governmentality. Given that she provides a very good synopsis of governmentality too, it is illustrative to initially quote her at some length:

'Foucault wrote in 1978 that governmentality, understood as the way in which political power manages and regulates populations and goods, has become the main way state power is vitalized [sic]. He does not say, interestingly, that the state is legitimated by governmentality, only that it is 'vitalized,' [sic]

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<sup>52</sup> (Foucault 1977a:222).

<sup>53</sup> *Ibid.*

<sup>54</sup> (Hunt & Wickham 1994:61-62) (quoting (Foucault 1977a:222)).

<sup>55</sup> 'Discipline has created new functions and incitements to legalization [sic]. Law in turn has opened new sites to the development of disciplines...If one stays with Foucault's pronouncements in *Discipline and Punish*, it looks like law plays a role primarily as an ideology which serves to cover up the transformation in the way power is being exercised in modern society. If we stop there, we can make little sense, from Foucault's perspective, of the ferocious activity around legal rules that govern power relations in work, the professions, and the family during the late 19th and 20th Centuries' (Simon 1992:50-51).

<sup>56</sup> '[I]n reality we have a triangle sovereignty-discipline-government, which has as its primary target the population' (Hunt & Wickham 1994:23,51).

suggesting that the state, without governmentality, will fall into a condition of decay. Foucault suggests that the state used to be vitalized [sic] by sovereign power, where sovereignty is understood, traditionally, as providing legitimacy for the rule of law and offering a guarantor for the representational claims of state power. But as sovereignty in that traditional sense has lost its credibility and function, governmentality has emerged as a form of power not only distinct from sovereignty, but characteristically late modern.'

(Butler 2006:51-52)

Support for this approach can be found in the more general observations of Thomas Lemke; '[F]or Foucault the state itself is a 'technology of government'; since it is 'the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on, thus the state can only be understood in its survival and its limits on the basis of the general tactics of governmentality'<sup>57</sup> (Lemke 2005c:9). Butler then goes on to hypothesise that:

'Sovereignty in this sense no longer operates to support or vitalize [sic] the state, but this does not foreclose the possibility that it might emerge as a reanimated anachronism within the political field unmoored from its traditional anchors.'

(Butler 2006:53)

Given that Foucault insisted both forms of power could exist simultaneously, she goes on to suggest that 'the current configuration of state power, in relation both to the management of populations (the hallmark of governmentality) and the exercise of sovereignty in the acts that suspend and limit the jurisdiction of law itself, are reconfigured in terms of the new war prison' (Butler 2006:53). The crux of her thesis in *Precarious Life* is that, whilst the suspension of law in 'Camp X-Ray/Guantanamo Bay' can clearly be read as a 'tactic' of governmentality, it can also be viewed as making room for the resurgence of sovereignty (Butler 2006:54-55). 'The resurrected sovereignty is thus, not the sovereignty of unified power under the conditions of legitimacy, the form of power that guarantees the representative status of political institutions. It is, rather, a lawless and prerogatory power, a 'rogue' power *par excellence*' (Butler 2006:56). Whilst Butler's analysis is confined to a suspension of the rule of law that ultimately brings about indefinite detention, she asserts that 'Petty sovereigns abound reigning in the midst of bureaucratic army institutions mobilized [sic] by aims and tactics of power they do not inaugurate or fully control. And yet such figures are delegated with the power to render unilateral decisions, accountable to no law and without any legitimate authority' (Butler 2006:56). To these 'petty sovereigns' one might also wish to add Pakistan's President General Pervez Musharraf,

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<sup>57</sup> (Foucault 1979:103).

whose recent suspension of Chief Justice Iftikhar Mohammad Chaudhry has brought about much debate on democracy, constitutionalism and the role of military in the country<sup>58</sup>.

Returning to Butler's discussion of governmentality, I am now forced to note *ex post* that the crux of this thesis could be described as somewhat Butlerian – that we might better view anti-circumvention legislation (as a well-lobbied 'abdication' of juridical control of copyright law to TPM) as akin to a suspension of the rule of law that enables, not a resurrection of classical sovereignty within governmentality, but of a 'Market Sovereignty' that operates *above* copyright law *per se*. Whereas Butler's petty sovereign suspends the rule of law to emerge sovereign – the market sovereign, on the other hand, appears to take copyright law into its own hands with TPM. In this sense, *code is cutting off the king's head*. Yet, in this instance, we have a somewhat perverse relationship between what I perceive as 'Market Sovereignty' and governmentality. In lobbying for the state to 'abdicate' its juridical power over copyright in favour of the free-floating control of TPM, the Market Sovereign seeks to retain the king's head<sup>59</sup> for the one purpose most beneficial to his cause, namely, that of a deterrent 'juridical' spectacle.<sup>60</sup> The current 'market populism'<sup>61</sup> of our modern-day governmentality has enabled copyright rightholders to code the parameters of their property in a manner that exceeds the parameters of copyright law *per se*, and seeks to reconstruct legally permitted exceptions to copyright as market failures now cured. We can also locate the role of law in this relationship as an extension of Foucault's liberal government rationality towards neo-liberalism and laissez-faire. As Bowrey observes: 'Copyright law, with its roots in liberal political economic theory, is relatively disinterested in consumption practices. The assumption is that the market processes information about people's needs more effectively than other types of institutions, particularly political institutions, with choices indicated by willingness to buy' (Bowrey 2005:140).

Returning to Foucault's problematic theorisation of the role of law in modern – and our distinctively late-modern – society, by way of a conclusion we may note, as Hunt & Wickham observe, that the point is not to construct a 'Foucaultian theory of law'<sup>62</sup>, but to ask ourselves of what use scholars such as Foucault, Burroughs and Deleuze may be to our understanding of the role of law, and of how we might locate law's role within a given discourse, or diagram of power-relations. As Beck testifies; 'Foucault offers a path towards producing a theory of the nature and context of law-making, and does so in a way which makes a place for diachronic, i.e. historical, awareness as an antidote to the synchronous or structured approach of black-letter law studies' (Beck 1996:501). As Baxter concurs; 'Legal scholars who borrow from

<sup>58</sup> And, quite possibly, the untimely death of Benazir Bhutto.

<sup>59</sup> On a stake, and on public display *outside the Tower of London*, if you will.

<sup>60</sup> It is arguable that anti-circumvention legislation, such as the DMCA, has done little more than make public examples of a handful of circumventers.

<sup>61</sup> 'This is the central premise of what I will call 'market populism': That in addition to being mediums of exchange, markets were mediums of consent. Markets expressed the popular will more articulately and meaningfully than mere elections. Markets conferred democratic legitimacy' (Frank 2002:xiv).

<sup>62</sup> (Hunt & Wickham 1994:viii).



disciplines such as economics or game theory, for example, routinely appropriate work that does not itself contain a developed, built-in theory of law. In these interdisciplinary borrowings the question is not whether the appropriated theory has itself gotten law right, but whether it contributes anything useful to ongoing work in legal scholarship' (Baxter 1996:464). It is to this end, that I ultimately propose the contribution of a Deleuzo-Foucauldian framework, to ongoing work in anti-circumvention law scholarship. Perhaps it is apt for this methodological conclusion of sorts to end with a reflection from Deleuze himself; 'When people follow Foucault, when they're fascinated by him, it's because they're doing something with him, in their own work, in their independent lives' (Deleuze 1995:86)

### **A Deleuzo-Foucauldian Framework for Analysis**

To reiterate Foucault's third 'technology of power': 'the new technology that is being established is addressed to a multiplicity of men, not to the extent that they are nothing more than their individual bodies, but to the extent that they form, on the contrary, a global mass that is affected by overall processes characteristic of birth, death, production, illness, and so on' (Foucault 2003:242-243). To this, 'so on' it is submitted one could add IP, or more specifically, as is my case in point, the co-evolution of copyright and technology. As Rabinow & Rose elaborate: 'To carry out these mappings of the possibilities opened up in this seemingly novel formation of biopower is not to ignore the negatives...the machinations of international capital, the hyped up marketing strategies of 'big pharma,' the new entanglements between truth, health and profit that characterize [sic] the relations between researchers and industry as well as the implications of IP for older forms of knowledge production, the possibilities of pathogenic release with wide scale effect, the massive inequalities in access to even basic healthcare, the more traditional forms of geopolitics which will make use of these new bio-possibilities in all sorts of inventive and often reprehensible ways' (Rabinow & Rose 2003:35). It is therefore submitted that it would not go against Foucault and Deleuze to construct a framework for analysing the control of *copyright law*, and *technology that facilitates copying* out of their respective theories/concepts and genealogical histories - it should be positively welcomed. As Rabinow & Rose have eluded, it would not only prove to be a much needed analytical tool for the implications of IP generally - references to 'big pharma' reveal the application of this framework would yield novel analyses of patents and biopatents - it is also submitted that it could be applied to Rabinow & Rose's other 'machinations of international capital' and 'hyped up marketing strategies'. To this end, it is submitted that lawyers analysing IP interrelated disciplines such as the pervasiveness of click-wrap contracting, and antitrust/anticompetition law would also benefit from further analysis under a Deleuzo-Foucauldian framework.

It is towards the benefits of this framework I wish to now turn. Given Foucault's unformulated titular concerns with Biopower, Biopolitics, Security, and Governmentality, I will from this point on, refer instead, to Foucault's 'third

technology of power' (yet keep citation-specific references in their original context). I will also refer to Deleuze's neologism as 'Control' whilst referring to the words' commonplace usage as 'control.'

It is submitted that a Deleuzo-Foucauldian framework offers three different points of analysis of the co-evolution of copyright law and TPM; namely:

1. Control – Communication – Architecture
2. Control – Communication – Discourse
3. Control – Communication – Etymological Experimentation<sup>63</sup>

### Control-Communication-Architecture

Control-Communication-Architecture analysis is not a new observation to academic discourse pertaining to copyright law, though my research concludes I have good cause to believe I am the first to propose the explicit application of a Deleuzo-Foucauldian framework to its analysis. Many IP scholars have described similar sentiments without explicitly taking their cue from Foucault and Deleuze. Weber, for example, states: 'development of trusted 'privication' architectures enables the 'owners' of...data packages to *control* the distribution of the information by technical means in a more efficient way than by reference to legal provisions' (Weber 2001:183 *emphasis added*). As do Campbell & Picciotto, who offer a more holistic articulation than Weber's – which is therefore, illustrative to quote at some length:

'[D]igital technologies and the Internet potentially offer a new solution: the power to *control* (and therefore charge) for access, or pay-per-view. Whether this can become established and accepted will depend on a wide variety of interrelated factors, involving *social* and *cultural* practices as well as *political* and *economic* decisions, embodied in legal regulation. Most importantly, it requires the creation of *excludability*, which entails strong *state measures of intervention* and investment of *legitimacy*'

(Campbell & Picciotto 2003:285 *emphasis added*).

Neither, however, explicitly refer to Deleuze when they speak of 'control'. Why would, or should they? After all, the word 'control' is relatively commonplace in the debate pertaining to copyright and TPM, and by no means synonymous with Deleuze's neologism - though I wish to advocate that it presents a novel framework through which all debate on the co-evolution of copyright and technology ought to engage itself hereafter.

The most seminal work in this field is that of Stanford law professor, Lawrence Lessig, who again, appears to touch on Deleuze's sentiments, without explicitly acknowledging his theorisation of 'Control':

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<sup>63</sup> Each presented as a Foucauldian 'triangle'.

'I believe that cyberspace creates a new threat to liberty, not new in the sense that no theorist had conceived of it before, but new in the sense of newly urgent. We are coming to understand a newly powerful regulator in cyberspace. That regulator could be a threat to a wide range of liberties, and we don't yet understand how best to control it. This regulator is what I call 'code' – the instructions embedded in the software or hardware that makes cyberspace what it is. This code is the 'built environment' of social life in cyberspace. It is its 'architecture'.'

(Lessig 2006:121)

We should not reproach Lessig for claiming to lay title to a 'code' Deleuze may have already coined<sup>64</sup>: 'In control societies, on the other hand, the key thing is no longer a signature or number but a code: codes are passwords, whereas disciplinary societies are ruled (when it comes to integration or resistance) by precepts (Deleuze 1995:180). We should, however, criticise him for locating his 'code' within the confines of disciplinarity – as what Deleuze described as a regulatory 'precept'. In the footnote concluding 'not new in the sense that no theorist had conceived of it before' Lessig notes: 'The general idea is that the tiny corrections of space enforce a discipline<sup>65</sup>, and that this discipline is an important regulation. Such theorizing [sic] is a tiny part of the work of Michel Foucault; see *Discipline and Punish*...' (Lessig 2006:363). This is the only reference you will find to Foucault in his entire corpus<sup>66</sup> of work. To Deleuze and Burroughs, there are none whatsoever. Thus, it is submitted, that even Lessig's framework is lacking for a number of reasons, and would benefit further from a Deleuzo-Foucauldian analysis. Firstly, he clearly misreads Foucault, treating him as the thinker of confinement Deleuze urges us not to<sup>67</sup>. This misreading promulgates a second mistake in reference to 'code' as a regulatory discipline. Here, it is submitted, Lessig can be seen to misread Foucault further, in not attending to his assertion that it is the 'everyday *physical* mechanisms...that we call the disciplines' (Foucault 1977a:222 *emphasis* added). In attempting to supplant Foucault's physical disciplines with non-physical computer code Lessig ultimately misses the shift towards the new

<sup>64</sup> As Deleuze acknowledges: 'encounters between independent thinkers always occur in a blind zone' (Deleuze 1999:36).

<sup>65</sup> This leads the author to hypothesise that the following citation from *Discipline and Punish* may have been the most influential on Lessig's formulation: 'a system of rights...egalitarian in principle was supported by these tiny, everyday physical mechanisms, by all those systems of micropower that are essentially non-egalitarian and asymmetrical that we call the disciplines' (Foucault 1977a:222).

<sup>66</sup> The author concedes that this can only be applied with conviction to all four of his published books (*Code and Other Laws of Cyberspace*, *The Future of Ideas*, *Free Culture*, *Code Version 2.0*), and his 'Law of the Horse: What Cyberlaw May Teach' article, though it is submitted these five publications amount to the bulk of his popular work and are holistically indicative of his 'corpus'.

<sup>67</sup> Leaving himself open to some fairly heavy criticism in the process: 'This misunderstanding is...serious when less gifted authors swallow the critique whole, and either reproach Foucault for sticking to confinement, or congratulate him for having analysed it so well' (Deleuze 1999:36).

'massifying' power-relations that take the population<sup>68</sup> as their target, Foucault heralds. This is not to say Lessig doesn't appreciate the manner in which Deleuze's 'Control' seeks perfection of regulation to the point of only offering permission<sup>69</sup>. He foresees, as Deleuze does, how 'code' can perfect control, yet fails to explicitly locate his 'code' within the networks of 'free-floating control...taking over from the old disciplines' (Deleuze 1995:178). In the same breath, however, he describes his regulatory 'code' as a component of a digital 'architecture of control' that better resembles Deleuzo-Foucauldian 'Control' than the Foucauldian site of disciplinary and regulatory confinement he seeks to ground his formulation of 'code'. In a second footnote attached to the end of 'architecture' Lessig analogises his digital 'architecture of control' with the work of a number of real-world design theorists who believe 'design structures functional relationships, quantitatively and qualitatively, and that it is a sophisticated tool whose power exceeds its cosmetic attributes' (Lessig 2006:363). This, it is submitted, better resembles a Foucauldian third power, than a disciplinary site of confinement – a Control society that seeks the encapsulation of a globally confined population. To this end, an anecdote is illustrative. I was fortunate enough to stumble on a primitive realisation of impending 'architectures of control' in my rebellious teenage-years. Every weekend I would partake in minor manifestations of criminal damage as a skateboarder – under the ever watchful eye of a closed-circuit-panopticon and faced with the occasional regulatory altercation I began to observe that disciplinary tactics lacked the capacity to ever be wholly effective if we still had – as all rebellious teenagers do – the capacity to actively pursue a path of resistance. I informed my peers that one day our disciplinarity would be lamented in light of the 'problem-oriented-policing' I prophesised<sup>70</sup>. I envisaged council-planners problematising skateboarders, and deliberately 'designing-out' the statistically-calculated undesirability of their actions. If there was a particular handrail they enjoyed 'sessioning' it would be easier to design a handrail one could not skateboard on (by designing 'breaks' in the handrail's continuity, for example), yet one that could still be used to aid the frail in mounting stairs. If the end result also had a visual aesthetic (or as Lessig's designers would have it, a 'cosmetic attribute') all the more better for it (these intentions should not be made explicit by the control society – and should be 'sold' on perceived advantages and trendy new design). The ultimate effectiveness of this form of 'ceaseless control in open sites' is that problematic skateboarders are neither ordered to cease and disperse with recourse to the law, should

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<sup>68</sup> A population Foucault defines as 'a set of elements in which we can note constants and regularities even in accidents...and with regard to which we can identify a number of modifiable variables on which it depends' (Foucault 2007:74).

<sup>69</sup> 'Felix Guattari has imagined a town where anyone can leave their flat, their street, their neighbourhood, using their (dividual) electronic card that opens this or that barrier; but the card may also be rejected on a particular day, or between certain times of day; it doesn't depend upon the barrier but on the computer that is making sure everyone is in a permissible place, and effecting a universal modulation- (Deleuze 1995:181-182), x-ref 'Adobe eBook Reader calls these controls 'permissions' – as if the publisher has the power to control how you use these works' (Lessig 2004:21).

<sup>70</sup> As Deleuze would have put it: 'Compared with the approaching forms of ceaseless control in open sites, we may come to see the harshest confinement as part of a wonderful happy past' (Deleuze 1995:175).

they not comply, nor persuaded to do so by a panoptic disciplinarity. The ultimate realisation that 'sessioning' said handrail is fruitless, emanates from within. Such a 'technology of self', was of course, an 'art of government' of which Foucault was acutely aware: '[S]overeign city planning emphasizes [sic] clear sightlines and monumental state architecture, techniques that together incite loyalty to a sovereign (Foucault 2005:19), whereas 'cities of security' are more concerned with managing public health and *other risks* (Foucault 2005:19 *emphasis added*)<sup>71</sup>. To this end, it is submitted that the approach taken by TPM can be viewed less as a copyright concern, and more as a criminological 'problem-oriented-policing' of digital content, or as akin to the concept of 'situational' crime control made famous by the Chicago School. As the pre-eminent criminologist David Garland writes in the final installment of his historical criminological trilogy, *The Culture of Control*, '[w]e now live in a 'new culture of crime control', where concern is with 'prevention, harm-reduction, and risk-management' (Garland 2001:171), as a 'series of adaptive responses to the cultural and criminological conditions of late modernity' (Garland 2001:193). Late-modern architectures of control, whilst resembling the modernism of Jeremy Bentham's 'Panopticon' are markedly different from disciplinary panopticism. It is sufficient to state that Bentham's 'Panopticon' was designed as an enclosed technology, which targets the behavioural moulding of site-confined subjects. Control, on the other hand, operates in 'open' networks, targeting larger populations. Techniques of 'situational' crime control, and 'problem-oriented-policing,' which respond to statistical observation of the population, and manifest corrective risk-assessment through what Foucault described as 'technologies of the self,' better resemble Foucault's third 'technology of power', and Deleuzian Control, than disciplinarity, even though they could be viewed as an extension of disciplinary panopticism. In this sense, Control might therefore, be characterised by an intensification and generalisation of the normalising apparatuses of disciplinarity that internally animate our common and daily practices, but in contrast to discipline, this control extends well outside the structured sites of social institutions through flexible and fluctuating networks (Hardt & Negri 2000 :23).

It is therefore, submitted that Lessig provides a paradigmatic example of an IP scholar in need of refining his erudite contribution through a Deleuzo-Foucauldian framework. Whilst the cornerstone of his work is founded on the recognition of the Internet, and digital technology, as an 'architecture of control' – albeit one imprecisely located in disciplinarity – he also recognises the stakes involved in the internalisation of permission. The problem with an architecture that simply says 'no', whether you want to bed-down on a park bench for the night<sup>72</sup>, or copy and paste a section of an eBook into your academic thesis is that it creates new norms. From the genealogical histories of Foucault, Deleuze observes three modes of power: sovereign power, disciplinary power, and Control - attributing to each what Foucault called a

<sup>71</sup> Cited in (Valverde 2007:168).

<sup>72</sup> For an extensive collection of park benches that have 'designed-out' the problematic of prolonged occupancy see: <http://architectures.danlockton.co.uk/2008/01/05/towards-a-design-with-intent-method-v01/> - Archived by WebCite® at <http://www.webcitation.org/5g3AoE0kz>

'technology of power' (Foucault 2003:242). 'One can of course see how each kind of society corresponds to a particular kind of machine – with simple mechanical machines corresponding to sovereign societies, thermodynamic machines to disciplinary societies, cybernetic machines and computers to control societies' (Deleuze 1995:175). This is a view shared by Hardt & Negri: 'To every language and communicative network corresponds a system of machines...We know well that machines and technologies are not neutral and independent entities. They are biopolitical tools deployed in specific regimes of production, which facilitate certain practices and prohibit others' (Hardt & Negri 2000:405). As Foucault was keen to articulate: 'Unlike discipline, which is addressed to bodies, the new nondisciplinary power is applied not to man-as-body but to the living man' (Foucault 2003:242-243). It is important to observe here the 'technology' Deleuze describes as emanating from Foucault incites more than the mechanical processes one would expect to result from the use of machines: 'which isn't to say that...machines determine different kinds of society but that they express the social forms capable of producing them and making use of them' (Deleuze 1995:180) too. To this end, 'In [Yale law professor, Jack] Balkin's view, culture is also a technology, or at least it has technologies built into it that guide and influence our social actions and judgments' (Vaidhyathan 2005:20). This is a point Deleuze really wishes to ring home, stressing 'the machines don't explain anything, you have to analyze [sic] the collective arrangements of which the machines are just one component' (Deleuze 1995:175). Thus, it is clear to see why Deleuze claims 'Burroughs was the first to address this' (Deleuze 1995:174) – this being the 'collective arrangement' between machines and their users. By controlling communication, i.e. controlling copyright, i.e. controlling digitised culture we are affecting cultural norms that will be internalised by those who interact with them, enabling the control society to achieve Control over the way we interact with copyright in the future. 'To be more specific, I would say that discipline tries to rule a multiplicity of men to the extent that their multiplicity can and must be dissolved into individual bodies that can be kept under surveillance, trained, used, and, if need be, punished. And that the new technology that is being established is addressed to a multiplicity of men, not to the extent that they are nothing more than their individual bodies, but to the extent that they form, on the contrary, a global mass that is affected by overall processes characteristic of birth, death, production, illness, and so on' (Foucault 2003:242-243). Simply put, to fully appreciate 'Control' we must realise that control of communication is more than a horizontal supplantation of '[control of] communication' with '[control] of the Internet'. One must also examine the potential use continuously-controlled communication will have on future norms pertaining to copyright and technology when modulated/internalised by end users.

Applying one further illustrative example to this assertion, I would like to draw your attention to a recent revelation regarding Nokia mobile-phone batteries<sup>73</sup>. Nokia has recently been 'outed' by cryptography expert Bruce Schneier for using an

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<sup>73</sup> For an ongoing investigation of many other problem-oriented design solutions see Dan Stockton's fascinating 'Architectures of Control' blogsite generally: <http://architectures.danlockton.co.uk/>

authentication method in their mobile phones that 'senses when a consumer uses a third-party battery and switches the phone into maximum power-consumption mode; the point is to ensure that consumers buy only Nokia batteries' (Schneier 2003:39). The issue at hand is clearly one of Nokia wanting to protect a business model that is purportedly more than 'Connecting People™' – namely persuading customers to buy their batteries over their competitors, when both may, given the chance, prove equally effective<sup>74</sup>. Here, similar to issues concerning Apple's iPod and iPhone, and Microsoft's MediaPlayer, the potential for antitrust/anticompetitive<sup>75</sup> action is best observed through the intentions of Deleuzo-Foucauldian 'Control'. Such an analytical framework, not only locates what I perceive to be an exponential growth in similar industry practices for which we, as legal scholars, should be on the lookout, within a business practice of 'Control' – it illustrates a technology of power we *all* should be constantly on the lookout for. As I will elaborate further, later in this thesis, it becomes even more problematic for legal scholars analysing such industry practices, when the deployment of TPM transforms what is essentially an antitrust/anticompetitive issue, into a problematic copyright concern.

This part of the Deleuzo-Foucauldian framework can be neatly summarised as Control-Communication-Architecture, given that it enables us to observe how the 'code' of our converging communications architecture (the Internet and all things digital) controls the use of, and modulates interaction with, copyrighted cultural content.

### **Control-Communication-Discourse**

A second analytical tool provided by a Deleuzo-Foucauldian framework is one that would be best described as 'Control-Communication-Discourse'. In this vein, a Deleuzo-Foucauldian framework urges us to consider how discourse and rhetoric, not only affect juridical and legislative processes, but increasingly modulate end-user interaction with copyrighted cultural content. Without explicit reference to intersections of the Deleuze-Foucault-axis, a number of legal scholars have made 'asides' to the pertinence of such an analysis, generally highlighting either the hypocrisy of certain US IP industries calling file-sharers 'pirates' in light of their own imperialist IP piracy policies, or elude to the successes of various industry lobbying tactics in the shaping of The WIPO Copyright Treaties, TRIPS, the DMCA, and before various European legislatures. It is submitted however, that unless we incorporate the use of rhetoric as a tactic of Control, our analytical capacity to fully grapple with the

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<sup>74</sup> And equally explosive: Whilst Nokia's initial defence to this undertaking was to assert that third party battery cell leakage is a common cause of mobile-phone explosions, their own battery cells have been proven to yield similar results (albeit without the fear of invalidating your warranty) (see: [http://www.theregister.co.uk/2003/11/10/nokia\\_batteries\\_not\\_safe\\_either/](http://www.theregister.co.uk/2003/11/10/nokia_batteries_not_safe_either/) - Archived by WebCite® at <http://www.webcitation.org/5g3B6Wzao>).

<sup>75</sup> Lest we not forget, at the time of writing Microsoft's outstanding antitrust violation debt to the EU stands at €899million.

effects this technology of power has on IP law will remain lacking at best, and may promulgate its goals/rhetoric further, at worst. The overarching effects of Control societies rhetorical tropes, it is submitted, are more effective and pervasive than the two aforementioned examples. The dangerous rhetoric of which I speak can be neatly summarised as pertaining to firstly, a 'private property' paradigm (with the conjoint use of 'piracy' and 'copyright theft' discourses), and secondly, a lack of definitional clarity when discussing Digital Rights Management (DRM), Technological Protection Measures (TPM) and Rights Management Information (RMI) (Many legal academics do not fully appreciate the difference, and analogise them with tangible private property, which further promulgates an already damaging rhetorical trope of Control) – a description of the fundamental differences and a plea for clarity will be offered later in this thesis). This has been observed by Campbell & Picciotto, who emerge highly critical of those who inevitably analogise technological protection with the 'locking-up' of 'private property' (Campbell & Picciotto 2003:299 *emphasis in original*). After discussing the codification of the Control of Communications-Architecture I will further discuss how piracy discourses, the private property paradigm and imprecise analogies of intangible goods with tangible property are all rhetorical tropes of the Control society we need to fully investigate to do justice to the topic at hand, and should refrain from being legally and technically deterministic, by listening to economists and rhetoricians.

The closest legal academic I have found to articulate this realisation is Kathy Bowrey, who in her book *Law and Internet Cultures* argues: '[S]o far most of the analysis has been preoccupied with draconian laws that enable corporate control over production and distribution of digital content. What has been missing from discussion so far is a consideration of *how this legal control over production and distribution fits with the consumption practices that support the development of new digital products and services*' (Bowrey 2005:139-140). She is astute enough not to misread Foucault and observes his third 'technology of power': 'Foucault was a useful writer for some scholarly lawyers. He emphasised the significance of governance by disciplinary mechanisms and the biopolitical. He argued that in modern nation states, individuals and communities police themselves without the need for formal exercises of power by others over them. To him there were far more intrusive and significant powers to be considered than the formal juridical apparatus of the modern nation state' (Bowrey 2005:16). She is also aware of Deleuze, though arguably not his thoughts on 'Control' as she only affords the work he has done on 'rhizomes and plateaus' with Guattari as a fleeting mention worthy of further investigation (Bowrey 2005:24). Ultimately, she fails to take her realisation of Foucault's third technology of power to its logical conclusion, or at least fails to explicitly articulate it. She simply states: 'As Foucault's work cried out for a stronger consideration of more dispersed forms of power, legal academics began to look at broader ways of thinking about what law was and about how law was being constituted' yet disappointingly concludes 'There are various 'Cultural' approaches to law' (Bowrey 2005:17). This, it is submitted is an 'entry level' enlightenment, akin to the academics I have already mentioned in the introduction of this framework. A multidisciplinary investigation is undoubtedly



much-needed, and Bowrey is one of a few to advance it in this manner, but she ultimately falls a little short of addressing Deleuze-Foucauldian Control, and therefore, short of arguing for its fullest realisation. She is right to point out we are currently being too legally and technologically deterministic: 'As lawyers needing to respond to ongoing proposals for digital copyright law reforms we have been drawn into pondering the significance of legal institutions and their deliberations, with too little contemplation of the developing global social relations of the law' (Bowrey 2005:140). She, is right to argue that we need to add more disciplines to our toolkit: 'Whilst sociologists, communications and cultural studies commentators, technologists, political theorists and philosophers have all used their respective disciplines and approaches to diagnose the general crises of unaccountable and invasive forms of network power, they seem to have brushed over the implication of it being primarily within the legal arenas that the power to change things is most accessibly and visibly located' (Bowrey 2005:199). It is thus submitted, through Bowrey's omission, that we *need* to add economics to our toolkit too. There are many economists – as vociferous in their contestations that *their* natural laws are being flouted by the Control society as the technologists decrying the natural law of the Internet is being flouted too. To these we can add Milton Friedman, Kenneth Arrow, Paul Samuelson and all the other Nobel laureates who have argued against copyright term extension; those who have argued that when the marginal cost of reproduction hits near zero it should be treated as a public good; and Campbell & Picciotto, and others who argue that artificial creations of scarcity should be welfare maximising and take into account unquantifiable costs to the public domain/commons. In response to all these cogent arguments, the rhetoric of the control society bombards them with a misplaced 'private property' paradigm, that ultimately serves its own end.

Another to describe parts of the Deleuze-Foucault-Axis - without explicitly referring to the aforementioned<sup>76</sup> - is the communications scholar and cultural historian, Siva Vaidhyanathan. He appreciates Foucault's third 'technology of power' without explicit reference to it: 'Communicative technologies, like many other technologies, reinforce, amplify, revise, and extend their ideologies. By using them, you change your environment' (Vaidhyanathan 2005:20). He is also aware of the rhetorical trope of 'private property' used by the control society: '[C]ourts, periodicals, and public rhetoric seem to have engaged almost exclusively in 'property talk' when discussing copyright. The use of "property" as a metaphor when considering copyright questions is not new. The earliest landmark cases in British copyright discuss 'the great question of literary property'' (Vaidhyanathan 2003:11). He also argues that '[W]e should avoid the rhetorical traps that spring up when we regard copyright as 'property' instead of policy' (Vaidhyanathan 2003:15). To this end he proffers two observations: 'Those who seek to restrict the flow of information use two rhetorical strategies when campaigning for the techno-fundamentalist changes that would empower them...An appeal to 'property' removes information policy discussions from the domain of the

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<sup>76</sup> Quite surprisingly, he cites Deleuze's *Negotiations* (in which his fleeting references to 'Control' are to be found) in the bibliography of his 2005 book, *The Anarchist in the Library*, without referring to him anywhere else in that work, or any other for that matter.

public interest. And an appeal to 'contraband' nudges the public to surrender freedom for the sake of imagined security' (Vaidhyanathan 2005:xii). Ultimately he provides one of the best arguments for why it is important to include an analysis of Control societies 'inventional resources'<sup>77</sup> in our analytical toolkit: 'Property talk is a closed rhetorical system, a specific cultural instrument that extends a specific agenda or value. Such ideological proclamations accomplish what many closed system ideologies hope to: They shut down conversation. You can't argue for theft' (Vaidhyanathan 2005:22).

A Deleuzo-Foucauldian framework allows these academic disciplines to unite in the face of a common enemy, and better support each other, as the risk is, if these debates stay niche, by the time they unite, Control societies will be one step ahead of them. Later in this thesis I will further discuss the effective rhetorical tropes of Control societies copyright/technology campaign, and describe analogies that may prove useful for the legal academic not wishing to fall for their pitfalls and further promulgate their rhetoric.

### **Control-Communication-Etymological Experimentation**

Some concepts call for archaisms, and others for neologisms, shot through with almost crazy etymological exercises: etymology is like a specifically philosophical athleticism

(Deleuze & Guattari 1994:8)

Anything they can do, you can do better. Pick up *The Concise Oxford Dictionary* - mix your own linguistic virus

(Burroughs 1969:292)

Finally I would like to suggest a third analytical approach offered by a Deleuzo-Foucauldian framework – an approach I have called Control of Communication (Etymology/Experimental Control). Recalling that Deleuze, in describing philosophy, once wrote: 'Some concepts call for archaisms, and others for neologisms, shot through with almost crazy etymological exercises: etymology is like a specifically philosophical athleticism' (Deleuze & Guattari 1994:8) I thought it prudent to look up the etymology of 'control.' Therefore, in the Concise Oxford English Dictionary, aside from its Medieval Latin origin (*contrarotulare* – literally, a copy-roll of accounts) – we next find the use of the word in the context of a 'control group' – a group forming the standard of comparison in an experiment. It is submitted that this etymological exercise yields a third analytical tool to be derived from Deleuze's description of a Control, that can be applied to the discussion at hand, namely the rendering of a consuming public as a 'control [group]' – by installing 'friction' that protects current business practices, effectively buying time to experiment with the best way to maximise profit in the future. 'Rather than harnessing the structural significance of

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<sup>77</sup> This is what rhetoricians refer to as the sharpest weapons in their rhetorical arsenal.

network technology, the law attempts to reinstate analogue-world barriers and instead of pushing the interests of creators and users, intermediaries tighten their grip' (Ganley 2004:332). As Bowrey, once again, articulates without explicit reference to Deleuze, this 'strategy is designed to slow the development of digital technologies to disrupt the establishment of the new hegemony and the birth of a new age. It is about slowing, if not stopping the information flows, unless or until they are adequately copy protected. A slower pace of change is not only more familiar to the old media owners; it is conducive to a fuller consideration of technological developments so that strategies allowing for profit maximisation can be implemented' (Bowrey 2005:147).

### Caveat

Of course, it might be somewhat unfair to wholly reproach Lessig for associating Foucault with disciplinarity. After all, Foucault, in grappling with the drift away from disciplinarity he foresaw, said: '[t]his technology of power does not exclude the former, does not exclude disciplinary technology, but it does dovetail into it, integrate it, modify it to some extent, and above all, use it by sort of infiltrating it, embedding itself in existing disciplinary techniques. This new technique does not simply do away with the disciplinary technique, because it exists at a different level, on a different scale, and because it has a different bearing area, and makes use of very different instruments' (Foucault 2003:242-243). As Deleuze has also suggested, disciplinarity does not operate dialectically; it does not disappear with the emergence of control (Harold 2007:xxix). Given that there has been no shortage of academics queuing up to rearticulate Lessig's work over the last ten years, I hope a realisation that the framework I am advocating provides a way for Lessig himself to sharpen his analysis lends support to the validity of my submissions. In some respects Lessig, working once again in that 'blind zone' may have come to this realisation quite independently, having recently declared that he is pursuing a new direction, to which it is illustrative to quote him at some length:

'In one of the handful of opportunities I had to watch Gore deliver his global warming keynote, I recognized [sic] a link in the problem that he was describing and the work that I have been doing during this past decade. After talking about the basic inability of our political system to reckon the truth about global warming<sup>78</sup>, Gore observed that this was really just part of a much bigger problem. That the real problem here was (what I will call a 'corruption' of) the political process. That our government can't understand basic facts when strong interests have an interest in its misunderstanding.

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<sup>78</sup> As Kenneth Arrow has recently noted, 'global climate change is a public good (bad) *par excellence*,' See: <http://www.bepress.com/ev/vol4/iss3/art2/> - Archived by WebCite® at <http://www.webcitation.org/5g3BSEumy>

This is a thought I've often had in the debates I've been a part of, especially with respect to IP. Think, for example, about term extension. From a public policy perspective, the question of extending existing copyright terms is, as Milton Friedman put it, a 'no brainer'. As the Gowers Commission concluded in Britain, a government should never extend an existing copyright term. No public regarding justification could justify the extraordinary deadweight loss that such extensions impose.

Yet governments continue to push ahead with this idiot idea - both Britain and Japan for example are considering extending existing terms. Why?

The answer is a kind of corruption of the political process. Or better, a 'corruption' of the political process. I don't mean corruption in the simple sense of bribery. I mean "corruption" in the sense that the system is so queered by the influence of money that it can't even get an issue as simple and clear as term extension right.'

(Lessig 2007)

To this end, it is submitted that he revisit Foucault and consider framing further analysis through a Deleuzo-Foucauldian framework. If he is sincere in his desire to root out the cause of this 'bigger problem' – the 'corruption' of the political process – it is submitted '[h]e ought to establish the basic sociotechnological principles of control mechanisms as their age dawns, and describe in these terms what is already taking the place of the disciplinary sites of confinement that everyone says are breaking down. It may be that older means of control, borrowed from the old sovereign societies, will come back into play, adapted as necessary. The key thing is that we're at the beginning of something new' (Deleuze 1995:182). It is submitted, to this end, that it is only through redress to a Deleuzo-Foucauldian framework that Lessig can really seek to locate the 'corruption' of the political process of which he speaks. To readdress our analyses through a Deleuzo-Foucauldian framework is to locate the actual diagrams of power relationships that may appear, on the surface, to often fly in the face of legal and economic rationality. As Valverde testifies, if such an undertaking 'helps any of us to continue reflecting on the provenance, the character and the effects of the analytical tools that we use in our own research and writing it will have served its purpose' (Valverde 2007:177).

### 3 The Hypocrisy of Forgetfulness

#### Towards a Genealogy of TPM

The bargain on which IPRs are built is historically *contingent*.

(May 2007a:20 *emphasis added*)

Genealogy is gray [sic], meticulous, and patiently documentary...it must record the singularity of events outside any monotonous finality; it must seek them in the most unpromising places, in what we tend to feel is without history.

(Foucault 1977:139-140)

The conjoint aim of this section of my thesis is to not only describe the co-evolution of copyright law and technology that either protects or facilitates the creation of copies, but to do so under the guise of a Foucauldian genealogy. In doing so, I seek not only to describe the historical evolution of TPM, as a natural precursor to the perceived need for anti-circumvention legislation – which will be dealt with in the proceeding chapter – but to locate the power-relations that have affected what I see as a mutual relationship between laws that protect the making of copies and technology that either facilitates or prevents the act of copy-making. To this end, it is submitted, with support from Christopher May, that there is a certain '*hypocrisy in forgetfulness*' in our late-modern understanding of IP law, to the extent that its current manifestation no longer resembles its historical roots<sup>1</sup>. It is submitted, however, that such forgetfulness

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<sup>1</sup> 'Although the institution of intellectual property has become in recent years increasingly globalized [sic] (indeed it has *potentially* been universalized [sic]), it owes its origins to the particular circumstances and history of European capitalism from the late fifteenth century in Venice onwards' (May 2007:21). 'From the single seed of the printer's privilege grows the author's legal right to print his work for a certain length of time. From this author's right emerge a number of secondary rights, the term of protection lengthens, the right is extended to other authors' (such as dramatists) operating within the realm of cultural production, and finally, this vibrant, slowly blooming flower outgrows the very country in which it first took root' (Deazley 2004:xviii). Given that Deazley, in this example was writing on the period 1695-1775, we might wish to observe that his slowly blooming flower may now be seen as having evolved into

is not brought about by a convolution of the mutual relationship between copyright and technology, but by power-relations. In attending to this endeavour, it is my intention to attempt to locate the diagrams<sup>2</sup> of Sovereign Power, Disciplinary Power and Control/Foucault's Third 'Technology of Power' within the history of copyright and TPM, to illustrate what such an approach may yield over and above legally-deterministic scholarship, and to see if any power-relations emerge that are not obviously reconcilable with the three Foucault has unearthed to date. It is imperative to observe from the onset that what I seek to illustrate below is nothing like a fully-fledged genealogy of copyright law and TPM, but rather, a step *towards* a genealogy of TPM. It is recognised by the author that attending to this task is an imperative for the future<sup>3</sup>, but it is only his intention to illustrate what shape a genealogy of TPM might take, illustrating points of attachment that ought be later pursued, in further depth. It is also his intention to write this chapter in the 'style'<sup>4</sup> of a Foucauldian genealogy, drawing support from a breadth of seemingly obvious historical sources, that are unfortunately, not afforded the attention they deserve by many academics responding to the 'law on books.' As Foucault reminds us in his seminal essay on Nietzsche: 'Genealogy is gray [sic], meticulous, and patiently documentary...it must record the singularity of events outside any monotonous finality; it must seek them in the most unpromising places, in what we tend to feel is without history...Genealogy, consequently, requires patience and a knowledge of details and it depends on a vast accumulation of source material' (Foucault 1977:139-140). It is *towards* such a genealogy of TPM, that the direction of this chapter seeks to undertake an inaugural articulation.

### The Hypocrisy of Forgetfulness

It is illustrative to begin with an analysis of Christopher May's most recent contribution to academic scholarship pertaining to IP, namely his 2007 journal article for the *Review of International Political Economy* entitled '*The Hypocrisy of Forgetfulness: The Contemporary Significance of Early Innovations in Intellectual Property*.' It is submitted that this article, instead of seeking to present an evolutionary history of IP, actually takes an unintentionally Foucauldian approach. Simply put, for

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a parasitic ivy of sorts, with rhizomic roots in every corner of the globe. A cutting was taken, and replanted in American soil, where it has undergone continuous genetic engineering, before being repackaged and resold as the most natural of rights.

<sup>2</sup> 'A truly Foucauldian reading...would seek to expose the 'diagram of a [given] mechanism of power' (Foucault 1977a: 205) in order to uncover the complementarity of power and the individuals who are 'subjected' to it' (Voruz 2005:171).

<sup>3</sup> And could be expanded towards a 'Genealogy of Intellectual Property' *in toto*. 'We must do the spade work of investigating the unfolding history of the world we have received' (May, T 2005a:75).

<sup>4</sup> Foucault's genealogical histories 'also draw us into an enactment of genealogical thinking as we read; they put us through our genealogical paces, so to speak, put us in mind of the contingency of things and prevent our thinking from hardening into set categories and definitive analyses' (McWhorter 2005:85).

reasons I will now discuss, it better represents a Foucauldian genealogy than an evolutionist contribution to legal history.

Whilst a number of excellent legal histories have been written on copyright law – of which Sherman & Bently's *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* instantly springs to mind – very few meet Foucault's stringent criteria for genealogical writing. To take Sherman & Bently's erudition as an example, we find them describe from the onset, that 'working from the basis that the past and the present are intimately linked, we believe that many aspects of modern intellectual property law can only be understood through the lens of the past' (Sherman & Bently 1999:1). This, it is submitted, is where the deciding difference in their approach can ultimately be observed. For Foucault, the lens of the past is undoubtedly important, yet, '[t]he critical intention of genealogical analysis,' writes Mark Poster, 'is to reveal a difference in a phenomenon in such a way that it undermines the self-certainty of the present without presenting the past as an alternative'<sup>5</sup>. It is important to remember that Foucault is not a reformist, but a thinker who relies on history to rupture the illusory objectivities of the present (Voruz 2005:170). In so doing one has 'to demonstrate that the past actively exists in the present' (Foucault 1977b: 146 (Voruz 2005:165-166)), yet the point is not to describe the present objectively through a descriptive analysis of the historical conditions that brought it about. A genealogy is *not* a description of things as they actually are, it is a 'history' of how things have come to be seen as objective (Voruz 2005:165).

To this end, it is submitted that the legal histories of scholars like Christopher May and Ronan Deazley present themselves, perhaps quite unintentionally, as better resembling Foucauldian genealogies than traditional legal histories. The former recognises, for example, that 'we must historicize [sic] the development of IPRs and deny the presentation of them as natural rights' (May 2007:22), and the latter, that legal-historians should not undertake the provision of 'interesting, if somewhat homogeneous, reading' (Deazley 2003b:270), but should seek to fracture the objectivity of the present<sup>6</sup>. Whilst, as we have already observed, Foucault may appear to expel law throughout much of his work, it is submitted that the critical analysis undertaken by most legal historians, if undertaken correctly, has the capacity to lend itself well to the genealogical enterprise. As Paul Veyne has observed: 'The Foucault-style genealogy-history...completely fulfills the project of traditional history; it does not ignore society, the economy, and so on, but it structures this material differently - not by centuries, peoples, or civilizations, but by practices' (Davidson 1997: 181).

As May strives to assert in *The Hypocrisy of Forgetfulness*, '[t]he bargain on which IPRs are built is historically *contingent*' (May 2007a:20 *emphasis added*). We should make necessary use of Foucault's work 'to recall the contingencies of our own history and to remind ourselves – because we so often forget – that our history is

<sup>5</sup> Mark Poster: 'Foucault and the Tyranny of Greece', in (Hoy 1986:209).

<sup>6</sup> See: (Deazley 2003a:106): 'for over 200 years, our thinking about the historical basis underpinning our modern copyright regime has been guided by an erroneous reading of *Donaldson* that seeks to place the author as the central protagonist of the copyright system', and (Deazley 2003a, 2003b, and 2004) generally.

indeed contingent' (May, T 2005a:76). For Foucault, it is our objective understanding of the present that needs to be displaced, for *this objective understanding is itself contingent* (Voruz 2005:167). This contingent choice comes to be objectified in discourse and subsequently manifests itself as uncontroversial truth. Foucault's concern is thus to show how 'historically, effects of truth are produced within discourses which in themselves are neither true nor false' (1980: 118). The difference is primordial: a genealogy is a 'history' of how interpretations have become objectified (Voruz 2005:166). If we are told that there are no moments other than this one, if we are caught up in the urgency of our present at the expense of understanding how we arrived at it, then perhaps this is not because the contingencies of our history have become irrelevant to us now but because those contingencies have led us here. And, because they are contingencies, we can understand the path that brought us here and, in their wake, construct paths that may lead us out (May, T 2005a:73). This, it is submitted, is ultimately the point May seeks to make in *The Hypocrisy of Forgetfulness*, asserting that 'universalist claims for IPRs in multilateral (or global) governance, need to be tempered by an historical perspective' (May 2007:3) in order 'to stress that there is nothing 'natural' about intellectual property rights' (May 2007:20).

### **Towards a Genealogy of TPM**

Any genealogical endeavour to trace the power-relations of copyright law as it pertains to the mechanical act of copying would prudently seek to start with the first recorded copyright 'conflict,' namely, that of the first copyright 'pirate,' and now-canonised patron saint of bookbinders, St. Columba of Iona (often referred to as 'Colmcille,' or 'Columcille'). In 557 C.E. Columba, a mere monk at the time, copied without permission, a monastic psalter belonging to St. Finnian of Moville, an Abbot and prior mentor of Columba's at the time, who subsequently complained of this 'piracy' to the High King of Ireland. In his ruling against Columba, King Diarmait said: '*Le gach bain a bainin, le gach leabhar a leabhran,*' or 'To every cow its calf, to every book, its copy'<sup>7</sup> (Gantz & Rochester 2005:32), the first recorded legal enunciation of copyright, the reverberation of which can still be felt in many modern copyright disputes<sup>8</sup>. After King Diarmait's decree, Columba refused to return Finnian's psalter, and in an ensuing battle, Diarmait was ultimately killed, along with 3,000 others, in what is now known as The Battle of Cooldrumman (Gantz & Rochester 2005:32). An assertion I wish to

<sup>7</sup> Ireland was then, as now, an agricultural society and one of the native Brehon Laws of the time related to the ownership of animals found wandering. The very reasonable rule of law was that a calf, wherever it might be found, belonged to its mother, wherever that cow was kept...It must also be remembered that at the time, paper and printing had yet to be invented, so that books had to be laboriously hand-copied onto Vellum; it was common knowledge that vellum was manufactured from treated calf-hide, rendering the High King's judgement doubly apposite in his choice of illustration (See: <http://www.copyrightprotection.com/history.htm> - Archived by WebCite® at <http://www.webcitation.org/5g3Be872o>).

<sup>8</sup> See: e.g. *Edlred v Ashcroft* (2003) 537 U.S. 186.



make unequivocally clear throughout this thesis is that TPM are not historically new phenomena. Not only does this 6<sup>th</sup> Century account show that copyright has a deep-rooted past, so too does the conceptual idea of TPM. As Columba's reputation began to precede him, it has been reported that some Abbots took to hiding<sup>9</sup> their libraries from him, as a non-technical form of 'access-control' and 'copy-control.' If we wish to ensure the 'Technological' aspect of TPM is not neglected in this submission, we need look no further than the lock and key protection afforded some surviving monastic manuscripts (Zittrain 2005) of the time, again, used as a primitive form of 'access-control' and 'copy-control' TPM.

Through a clear desire to make the act of hand-copying easier and more efficient, we can observe that this form of human copy-making technology was ultimately overtaken by the advent of the moveable type press, yet we should avoid being technologically deterministic in this assertion. As May observes: 'Around five hundred years before the invention of movable type in Europe, the innovation which sparked the 'Gutenberg revolution' in printing, the Chinese had used this method to reproduce texts...[yet] this was never fully developed, partly because of the large number of characters in written Chinese, but also to Chinese eyes, movable type worked against the established (and highly valued) traditions of calligraphy' (Febvre & Martin, 1976: 75; Chia, 2002: 202, both cited in May 2007a:15). In China we can observe that the act of copying was well respected, and it wasn't until TRIPS, that China got its first copyright laws.

It is not until 1476, however, that the real technology (in its common parlance) pertaining to copyright law begins to enter the historical picture, when William Caxton brought the first moveable type printing press to England, paving the way for the creation of the first formally recognised copyright, or *copye*. That year the Crown, realising the immense opportunity that the printing press gave authors wishing to publish tracts inimical to its interest, passed a law requiring all printers to inscribe their names and locations, and the titles of all works they wished to print in a government register. If approved, the printer received authorisation to make a *copye* (Gantz & Rochester 2005:33). Thus, we can observe this initial formulation of copyright as a sovereign privilege, or 'royal prerogative,' albeit one that sought indirect censorship of communication inimical to its interests.

Almost eighty years later, during which the Crown issued successively stricter rules against the creation of multiple copies of written work, in order to strengthen censorship (Gantz & Rochester 2005:33), Queen Mary chartered the Royal Stationers Company of London in 1557, giving the then 150-year-old guild of bookbinders, engravers, book sellers, and printers a State-sanctioned monopoly on publishing. This not only established a 'horse trade that gave printers a monopoly' but also provided 'the Queen the means to control what was published in England, which at the time was

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<sup>9</sup> At one stage, a certain Abbot, on hearing that Columcille was on his way to visit, buried his complete library in the Orchard, provoking the frustrated Columcille to put a curse on the monastery! (See: <http://www.copyrightprotection.com/history.htm> - Archived by WebCite® at <http://www.webcitation.org/5g3Be872o>).

fending off the religious incursion of the Protestant reformation' (Gantz & Rochester 2005:34).

From this pre-history to legislative copyright, we can observe that copyright was born from sovereign prerogative - a prerogative that only began to lose its footing in the repeal of the 1662 Limitations Act<sup>10</sup>, and ultimately in the enactment of the world's first copyright Act - the 1709 Statute of Anne - marking the end of what Foucault has observed as sovereign power-relations. To couch this observation in more Foucauldian terms we might say that up until this point it was the sovereign alone who exercised power over the creation of copies - literally the right to order life of *copies*, or condemn to death inimical communication. As May attests, this is also observable in the patent system of Venice, with more literal ramifications: 'A letter of patent from the Sovereign allowed...a limited (but sometimes renewable) monopoly for their imported practices...[and] the death penalty awaited glass makers who breached the Venetian monopoly in manufacturing' (May 2007a:8). With the Statute of Anne, enacted to stem the flow of mass-piracy by Scottish bootleggers, we can observe that whilst printing-press technology facilitated the act of mass copy-making, the cost of operating such a technology was relatively prohibitive, and as such, only proved to be a lucrative criminal enterprise for a select number of mass-infringers, and a virtuous enterprise for those wishing to print literature of a kind that would have been previously censored by the royal prerogative<sup>11</sup>.

Whilst we may note that the Statute of Anne, also emanated from what Foucault would describe as the juridical sovereign power of the crown, the Act brokered<sup>12</sup> resembles less a royal prerogative, and heralds the dawning of a more governmental approach to copyright. In returning to Foucault's three 'technologies of power', as I will explain further as this fleeting history unfurls, it is somewhat otiose to observe a sudden jump from patently obvious sovereign power-relations to a governmentality of sorts that becomes most apparent when we welcome the advent of technologies of digitisation. Whilst we may struggle to find an intermediary period of disciplinary power-relations that a Foucauldian analysis would lead us to expect, the problem lies in disciplinarity's marriage to 'sites of confinement.' It need not be

<sup>10</sup> 'In 1695, the licensing acts that provided prepublication censorship to the government expired as Parliament, which had toppled James II in 1689 and taken over the business of governing, let older monarch-controlled monopolies lapse' (Gantz & Rochester 2005:34).

<sup>11</sup> 'Scotland, although ruled by the same monarch had no copyright law. Therefore, books published in England would be copied in Scotland and resold in England at a fraction of the price charged by the Stationers. At the same time, independent authors could have their books printed in Scotland if they couldn't get them picked up by the Stationers. By targeting successful works, the bootleggers could avoid payments to editors and authors, marketing costs, and the risks of publishing unknown works' (Gantz & Rochester 2005:34).

<sup>12</sup> 'England, at this time, wanted Scotland as a haven against potential attacks from the French and for support against uprisings from those endeavouring to put James Stuart, the Old Pretender and son of King James II, on the throne. For its part, Scotland wanted trade with England and a share of the book business. The result was a treaty and the previously mentioned Statute of Anne, which established a governmental copyright system. The public relations puff suggested that it was intended to eliminate the monopoly of the book trade (as well as the Royal Stationers Company), set up a copyright system that included Scotland, and encourage the production of new works' (Gantz & Rochester 2005:35).

submitted that a search for power-relations pertaining to the interplay of copyright law and copy-making technology in Foucault's traditional sites of confinement (family, schools, barracks, factories, hospitals, and penitentiaries) will prove fruitless. Further analysis of Deleuze's 'thermodynamic machines' as disciplinary mechanics proves even less fruitful. It is submitted however, that perhaps, a period of disciplinarity can be observed, if we treat the copy-making technologies themselves, as sites of confinement. This, it is submitted, is not a procrustean attempt at making Foucault's disciplinarity 'fit' the genealogy I seek to address, but a genuine belief that the limitations of pre-digital technology played an essential role in regulating copyright law. That copyright infringement was a relatively technologically, economically, and geographically confined phenomenon until the advent of digitisation. The photocopier and the process of xerography, for example, is paradigmatic of what I perceive to be an inherent economic and technological site of confinement. Whilst the advent of the photocopier made it substantially easier to make copies of printed material, the decrease in copy-quality brought about by the act of repeated copying, combined with a prohibitive high-cost barrier that makes the legitimate purchase of codex books substantially cheaper than photocopying them *in toto* is ultimately dissuasive. In this sense, one can observe how the technological limitations of this copy-making machine represent a Foucauldian 'technology of the self', or could be perceived, albeit in its technological shortcomings, as a architecture of control, that doesn't require an 'apparatus of security' to ensure we comply with copyright law.

It was not until the creation of mass-produced blank music cassette and cheap tape-deck recorders that TPM pertaining to the protection of music began to emerge, albeit in an analogue form, further fracturing the technologically determinist legal belief that TPM are late-modern practices predicated on digitisation. Whilst there has been much discussion on Digital Rights Management in the last ten years, there has been little to no consideration of *Analogue Rights Management*. In addressing this 'hypocrisy of forgetfulness' we may wish to recall the fact that analogue music cassettes of the C-60 variety have always employed a primitive copy-control TPM, that operates through the removal of two plastic 'tabs' that create breaks in the continuity of the cassette's spine in order to prevent them from being recorded<sup>13</sup>. In an attempt to redress the relative ease with which such cassette-centric technology could be employed to copy vinyl LPs at the time, relatively obscure experimentation with a form of vinyl copy-control TPM has also been noted: A high-pitched frequency was pressed into the album, which was inaudible to the human ear during playback, but which would destabilise the process of recording the album to cassette tape<sup>14</sup>. Such experimentation was ultimately abandoned with the realisation that the fineness of

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<sup>13</sup> Whilst this design feature was 'sold' to consumers as a way of preventing the accidental recording-over of their own cassette recordings, one will not be surprised to hear that commercially available pre-recorded cassettes were sold with these 'tabs' removed as standard. Of course, this primitive form of TPM was easily circumvented by placing sticky tape over the breaks, duping tape-deck recorders into believing the 'tabs' had never been removed.

<sup>14</sup> See: [http://www.currybet.net/cbet\\_blog/2008/01/drm\\_for\\_vinyl.php](http://www.currybet.net/cbet_blog/2008/01/drm_for_vinyl.php) - Archived by WebCite® at <http://www.webcitation.org/5g3CDIAU>

grove required to create the necessary 'spoiler pitch' was rapidly worn away with everyday use<sup>15</sup>. Lest we not forget, commercially available analogue VHS cassettes have also been protected by a copy-control TPM called Macrovision since the early 1980s, and with the emergence of the now obsolete Sony Betamax format we have the seminal space shifting-ruling of *Sony v. Universal Studios*<sup>16</sup>. Again, in these forms of analogue technology an inherent economic and technological confinement prevents them from posing too big a problem for copyright law. The music industry was briefly concerned with the growing phenomenon of mix-tape trading, with recourse to their 'home taping is killing music' campaign, but the main threat posed by cassettes and VHS was predominantly located within the confines of organised crime, and recourse through the law was unproblematic.

Digitisation, and therefore the promise of perfect copies, was eventually delivered in the form of Digital Audio Tapes, though they were rapidly ushered out of the popular market by CDs. From here we can observe that the first legislated form of digital TPM manifested itself in The Audio Home Recording Act (1992) that applied specifically to DAT tapes, and mandated the requirement that all hardware capable of playing DAT tapes came with pre-installed copy control TPM. CDs inevitably rendered both this legislation and DAT a relic of the past, though it must also be borne in mind that the cost of CD-writer technology, with the first available piece of hardware to do so costing approximately \$100,000, was again, an inherent limitation to widespread piracy. CDs eventually got cheaper, and portability and size became the next 'benchmark', spawning the short-term lucrative craze of MiniDiscs. Whilst they made it easier and cheaper to make perfect digital copies of CDs, the cost of acquiring the new hardware required, and the small size of the market for commercially manufactured MiniDiscs, was ultimately prohibitive. The proliferation of cheap CD-writers and blank CDR media brought about a revival of the mix-tape revolution, and created a widespread piracy problem. The world wide web was born, and offered the promise of being able to download MP3s from the Internet; only with a dial-up internet connection clocking up anything between 1 to 7 hours per MP3 the time, and cost of the phone bill were dissuasive. As personal computer processors got faster and cheaper, and broadband Internet connections began to replace the outmoded 'dial-up' method, we can begin to observe the emergence of our third 'distributed' societal diagram

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<sup>15</sup> As an anecdotal aside, I was relatively content in the knowledge that the USB Vinyl-to-MP3 'Archiver' I have recently purchased represented what I perceived to be the purest form of TPM free copy-making. In fact, given the commercial availability of a technology that makes the copying of vinyl records possible, I assumed from the onset that it had not fallen foul of anti-circumvention legislation, and embodied a 'space-shifting' potential analogous with the seminal 'time-shifting' ruling of *Sony v. Universal Studios*. However, it is unequivocally clear, that such a 'vinyl archiver' cannot be put to any other substantially non-copyright-infringing use, unless the vinyl records are out of copyright, in the same way cassette recorders, and CD-writer drives are justified by their potential non-copyright-infringing uses.

<sup>16</sup> *Sony v. Universal City Studios* (1984) 464 U.S. 417.

From this point onwards TPM, as they are currently perceived, proliferate, rebranded in common parlance as Digital Right Management ('DRM') technologies; a term with seemingly unknown etymology.

As I will expound further in chapter 5, the rhetorical intentions underpinning this linguistic shift are twofold. First and foremost, the 'Digital' adjunct of DRM creates a discourse whereby the concept unpinning the technology employed, as well as the digital technology *per se*, is presented as primarily concerned with the protection of digitised content. Secondly, the reference to 'Rights' intentionally evokes the natural 'rights' discourse of tangible private property. Furthermore, '[t]he use of the word 'rights' in 'digital rights management' nomenclature is controversial, because the power claimed by publishers through trusted systems may not necessarily map to actual legal rights allocated to them by copyright. For example, a 'rights management' system might be used to lock up a public domain document' (Zittrain 2005:20).

The examples at hand are too numerous to cite, given the number of different proprietary models employed by competing commercial enterprises. For example, it should be noted that Apple's 'Fairplay' TPM is markedly different to Sony's 'Connect' TPM. Suffice it to say, it has been applied to everything capable of digital delivery pertaining to copyright. Not only is it obviously applicable to digitised music, but software, digitised books<sup>17</sup>, and the recent provision of on-line, on demand television. Here we can observe that Foucault's third 'technology of power' and Deleuzian Control come to dominate endeavours to control digitised copyright material. Given the distributed architecture of this 'technology of power', it became imperative to modulate the control of copyright through its end user. 'In many ways, the ability of computer code to govern behaviour can be more effective than mere laws' (Loren 2002) which serve the function of rule and sanction. Instead of punishment, TPM can lead to prevention (Weber 2001:183). From looking at a few pertinent examples, we can ascertain how the various motivations for different forms of post-digitisation TPM cannot be ascertained through analysis of the technology and copyright law alone. There are some forms of TPM, such as the Adobe eBook reader TPM popularised through Lessig's scholarship that are open in their assertion that This Property's Mine, whilst others, such as Sony's rootkit TPM are more discrete, choosing to prevent copy-control by installing a rootkit (a form of 'back-door' access commonly used by 'trojan horses' viruses) onto your computer. We can also observe, through recourse to the TPM proposed for the SDMI (famously circumvented by Edward Felton), and the 'CSS' TPM currently used to protect DVDs, that industry 'cartels' have been established, not to provide an open platform for everyone wishing to employ this TPM, but as a means of protecting the bigger industry players from direct competition. Just as it is inevitable that the Internet will promulgate the unrestricted distribution of 0's and 1's, it is another natural law of the Internet that what has been coded can easily be unravelled, which in turn, has led to a technological 'arms race' between programmers and hackers that is antithetical to the Anglo-European vision of copyright as based on a utilitarian model (Loren 2002). Where there is a will, there is a way, and no sooner has

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<sup>17</sup> For a comprehensive account of eBook related TPM see: (Lever 2007).

a new technology been advanced, it has been expediently broken into (Smith 2005b). It therefore followed, that the 'information industry' increasingly lobbied for a public law framework to protect their private self-regulation, with widespread success.

By way of a conclusion of this call for a genealogical investigation of TPM, it should be constantly borne in mind that a simple, linear evolution presents itself. From this step towards a full genealogy of TPM we can observe that technology has been primarily concerned with making the act of copying any given medium easier and cheaper. As the production of copies gets cheaper and easier, for whatever reasons, more copies are produced and subsequently distributed. Where this clashes with business interests and moral rights (more the former than the latter), copyright law steps in to make it more difficult to create and distribute more copies. From this relationship we can observe that the evolution of copyright and technology that either facilitates or limits the act of copying is correlative. They have co-evolved. If our present relationship between copyright and technology is viewed as problematic, it is not that either of these limbs is discernibly 'out of sync' or problematic *per se*, but because we are on the 'edge' of a momentous shift between two different diagrams, or technologies of power, and this shift has rendered their relationship problematic. With the advent of digitisation and the Internet it appears that Marshall McLuhan's early prophesy has finally come true: 'We are today as far into the electric age as the Elizabethans had advanced into the typographic and mechanical age. And we are experiencing the same confusions and indecisions which they had felt when living simultaneously in two contrasted forms of society and experience' (McLuhan 1962:1).

## 4 Codification

### Law on the Books: The Legitimacy of Code

I opened it at page 96 – the secret page on which I write my name to catch out borrowers and book-sharks.

(Flann O'Brien: *Myles Away from Dublin* 1990)

You will be glad to hear that every copy of *Sense and Sensibility* is sold and that it has brought me £140 besides the copyright, if that should ever be of value.

(Jane Austen: *personal letter* 1813)

In chronologically assessing the legislative attempts of the World Intellectual Property Organization ('WIPO'), the US, Australia, and the EU, I will seek to support the claim that in giving too much deference to the protection of TPM<sup>1</sup> employed by rightholders, the global legislature are edging closer and closer towards the creation of a copyright that is, what the technology behind it does, by effectively 'locking-out' those with legal rights mandated by fair use and permitted exceptions. Whilst the second limb of the 'information industry's' attack - namely the legal reinforcement of TPM protection - will preoccupy the main thrust of this discussion, only comparative asides will be made with the technical specificities of the TPM initially employed, given the strict word limit at hand. Furthermore, some understanding of copyright law and its exceptions is assumed, as the space required for a full discussion of every pertinent detail mentioned is regrettably absent. Before progressing, one factor to be perpetually borne in mind, is the 'information industry's' sole desire to further their own self-interest at the expense of the rights of other users. For example, Norway has been the only country to recognise the unfair business practices of iTunes in employing TPM to prevent legitimately purchased MP3s from being played on anything other than their own iPods (Smith 2006), and cogent arguments from Linux users that 'DeCSS' is only guilty of allowing them to play legitimately purchased DVDs on their relatively

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<sup>1</sup> Coupled with contractual constraints.

uncommon operating systems<sup>2</sup> have been met by assertions that they should stop whining and buy a real CD player (Smith 2005a). One final example concerns Sony's rootkit TPM, which not only blocks fair users from copying the CDs it protects, but does so underhandedly, by cloaking its existence on your CD drive, leaving your PC blissfully unaware of its susceptibility to virus attacks (Vance 2005). It is submitted that such business practices are unacceptable, as is the legislative framework that enshrines their protection.

### World Intellectual Property Organization Treaties

The WIPO Copyright Treaty ('WCT') (and the WIPO Performances and Phonograms Treaty<sup>3</sup> ('WPPT')) (collectively referred to as 'The Treaties'<sup>4</sup>) was not only the first treaty to mandate protection 'against the circumvention of effective technological measures<sup>5</sup>' employed by authors and their licensed intermediaries *per se*, it was the first 'special agreement<sup>6</sup>' of international reach to do so (Bäsler 2003:5). Affording such measures only a minimum level of protection - which contracting parties may choose to exceed - it is important to pass a few observations on the underlying rationale of The Treaties, given that both the US and the EU have already surpassed it (Bäsler 2003:6).

The fundamental tenet of copyright law enshrined in WCT is that "copyright protection extends to expressions and not to ideas<sup>7</sup>". Whilst Art.11 only mandates the protection of TPM used to safeguard such 'expressions' - giving due immunity to recognised exceptions and limitations not authorised by the authors concerned, but nonetheless permitted by law<sup>8</sup> - it will be argued further that present US and EU anti-circumvention provisions address *any* use technology can encapsulate over and above uses covered by copyright, and consider exceptions and fair uses as a market failure of copyright body that technology can heal (Dusollier 2005:203). Whilst a strict interpretation of Art.11 requires protection 'against the circumvention' of TPM, much debate has ensued as to whether such a 'conduct only' approach provides 'adequate' and 'effective' protection. Acknowledging that most acts of circumvention are committed in the privacy of one's home, and that the majority of these private actors lack the capability, time and effort to crack the cryptography employed independently,

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<sup>2</sup> Analogous to the 'time-shifting' argument conceded in the seminal U.S. case of *Sony v. Universal City Studios* 464 U.S. 417 (1984).

<sup>3</sup> Art.18 WPPT.

<sup>4</sup> Adopted at the WIPO Diplomatic Conference in Geneva on 20 December 1996 - and came into force on 6 March 2002.

<sup>5</sup> Art.11 WCT.

<sup>6</sup> As defined in Art.20 Berne Convention for the Protection of Literary and Artistic Works 1979 ('Berne'), and therefore, must be interpreted as offering the minimum level of protection as that provided for by Berne.

<sup>7</sup> Art.2 WCT

<sup>8</sup> It has been posited (Foged 2002:529, Ganley 2004:326) that works protected by TPM in which copyright term has expired under national law, therefore fall outside the protection of Art.11 WCT.



it must be conceded that a strict interpretation of Art.11 will insufficiently further the underlying objective of The Treaties. Therefore, in attempting to provide “effective” remedies against circumvention, the law also proscribes the production and distribution of devices used to circumvent TPM, and the trafficking/making available of said devices. However, as will be discussed further, a strict, textual interpretation of Art.11 may serve to ameliorate the problems posed by one-sided TPM from the onset; giving teeth to those with legitimate cause to circumvent overly-restrictive technical fences. Given that WIPO perceive Art.11 as primarily targeting those seeking to ‘pirate’ a protected expression (Keplinger 2001:17) it is submitted that it would not be outside the intention of The Treaties to authorise the creation and subsequent distribution of circumvention information/devices that facilitate legitimate use. Unless the sale of crowbars is to be banned from all hardware stores - given that they *may* be used to facilitate the destruction of tangible protection measures, as well as fulfilling legitimate DIY functions - TPM circumvention should only warrant sanction, when coupled with illegitimate intent. Crowbar ownership *per se* does not force the assumption that its ruler seeks to utilise it solely for the purpose of criminal enterprise; yet the anti-circumvention precedent set by The Treaties falls afoul of this damaging conflation<sup>9</sup> to the detriment of beneficiaries of legitimately pursued exceptions to copyright. Keen to deconstruct the perception that TPM better benefit developed countries (Keplinger 2001:2), WIPO regrettably failed to mandate a maximum level of protection for such technological fences. As will be illustrated below, the US, and EU Member States have all succeeded in legally ‘locking-up’ their intellectual expressions to a greater extent than WIPO could have reasonably foreseen. It must be borne in mind that as well as being articles for market consumption, copyrighted expressions also contain the intermediary building blocks for progress (Ganley 2004:295). We stand on the shoulders of giants, as the time-honoured maxim testifies...that is, unless you are a developing nation, or academic scholar, fenced-off from the (copyright exemptions/permissions of) the public domain by the all-encompassing TPM of ‘Silicon Valley’.

### Digital Millennium Copyright Act

On 28 October 1998 Congress passed the Digital Millennium Copyright Act (‘DMCA’), amidst extensive lobbying from the entertainment industry (Craddock & McCullagh 2005:165) against the perceived threat of rapacious Internet pirates. Its passage would have been impossible without the backdoor approach of aligning Europe through WIPO, and bringing the law back home as part of the WIPO Treaties package (Hiaring 2005:3) implemented through Art.1. Adopting a ‘minimalist approach (Braun 2003:496)’ in its implementation of The Treaties - It was necessary to recognise the

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<sup>9</sup> That the use of electronic crowbars, to lever access and copy control measures employed to protect digitised IP, mandates strict liability from the onset – at their point of use – irrespective of intentions that may prove legally permissible, e.g. disabling copy-control TPM in order to cut and paste proportions of the protected work for the purpose of criticism and review.

WCT and WPPT as points of attachment for protection, but no changes were needed to substantive rights as US law already met the requirements of The Treaties - adding, *inter alia*, the new Chapter 12 (§1201-1205) to Title 17 of the US Code ('The Code'), regarding TPM.

§1201(a)(3) and §1201(b)(2) define the effectiveness of TPM very broadly. Here, The Code draws an important distinction from the onset, between TPM protecting 'access control'<sup>10</sup>, and those safeguarding the exclusive rights of the copyright owner, or 'copy control'<sup>11</sup>, in only imposing civil and criminal sanctions on the circumvention of the former. Furthering its 'minimalist approach', the protection of 'copy control' measures was deemed undeserving (Bäsler 2003:6-7) of DMCA codification, since circumvention resulting in unlawful copying is already circumscribed by The Code<sup>12</sup>. Delineation of the contrast - between access to, and exploitation of, copyright content - is unproblematic. Under this typology, circumventing access control measures is the electronic equivalent of 'breaking and entering': the gravamen here is not copyright infringement at all; the invasion of another man's 'castle' is the offence in question (Nimmer 2003:394-5). A reporter wishing to comment on a play still has to buy a ticket in order to view the performance and whilst a 'fair use' defence may permit copying a book or recording - in whole, or in part - it does not allow the theft of it as a means to such end (Braun 2003:497). Whilst it is easy to lose sight of this distinction in public domain and innovation-promoting discourses promulgating a feared 'fencing-off' of works in which copyright has expired, the methodology employed by the DMCA in this respect, should be applauded. The complete works of Shakespeare may have outlived copyright, but one cannot expect a printed volume to come at no cost, and this should remain true for works distributed on the Internet. Market competition, and distribution costs dictate the price of access - which may prove very low, given the extensive endeavours of 'netizens' striving to offer free access to information online<sup>13</sup>. Freedom of information must never be conflated with freedom from expense. Yet, given the low transaction costs, collaborative capabilities and technological advances facilitating the increased dissemination of works online, the realisation of a 'freedom of expression at freedom of expense' will not be long in coming. The ethos of sharing and the technology to do so are already with us; only the all-encompassing TPM of intermediary information-industry rightholders<sup>14</sup> stands as a barrier to its fruition.

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<sup>10</sup> 17 U.S.C. §1201(a)(1).

<sup>11</sup> Whilst it is important to note that the latter category of acts are not limited to copying, this broader consideration has been replaced by a 'copy control' discourse in the bulk of the literature reviewed, and serves as a convenient short title for the discussion at hand.

<sup>12</sup> 17 U.S.C. §501-513.

<sup>13</sup> E.g. at [www.wikipedia.org](http://www.wikipedia.org); a portal, that since its 2001 creation has rapidly grown into the largest reference Web site on the Internet. The content of Wikipedia is free, and is written collaboratively by people from all around the world.

<sup>14</sup> Namely the 'middlemen' seeking to govern the flow of IP from its author to his public. Economic justifications for online publishers and the sweat of their brow is becoming increasingly untenable, given the comparative ease with which the Internet allows authors and end users to 'hook-up' online. Eschewing the business of the intermediary - or 'cutting out the middlemen', as the [www.creativecommons.org](http://www.creativecommons.org)

After this initial differentiation between copyright infringement and outright theft, it is somewhat erroneous that the main thrust of the DMCA proscribes the trafficking in devices that circumvent *both* access<sup>15</sup> and copy<sup>16</sup> controls. *Prima facie*, the wording of §1201 posits no problems for a fair use claim, expressly stating ‘nothing...shall affect rights, remedies, limitations or defenses [sic] to copyright infringement, including fair use’<sup>17</sup>. However, a resultant string of case law has confirmed academic suspicion that the anti-circumvention provisions of the DMCA, in practice, exist as an entirely different rights structure to copyright law, with no carefully nurtured guarantee that valuable limitations to copyright will be maintained (Ganley 2004:285). Since fair use is only a limitation on copyright - a permitted exception to its infringement - it is wholly irrelevant to the copyright-independent violation of access control circumvention<sup>18</sup>. However, whilst circumvention of copy control mechanisms is not illegal for fair users, dealing in circumvention devices that enable fair use is<sup>19</sup>. Simply put, digital crowbars have been unjustifiably outlawed. Furthermore, it was somewhat confusingly held by Judge Whyte in *US v. Elcom, Ltd.* that whilst it was the clear intention of Congress to impose a blanket ban on all trafficking in circumvention devices<sup>20</sup> and that such a ban was not unconstitutional, in doing so the DMCA does not eliminate fair use<sup>21</sup>. The prior submission - that technology enabling copying for fair uses is not primarily designed for the purpose of circumvention, or has a commercially significant purpose other than the circumvention of TPM (Bäsler 2003:9) - has been ignored before these courts. Perhaps some solace may be found in the recent ruling of *IMS Inquiry Management Systems Ltd. v. Berkshire Information Systems*<sup>22</sup>. Here Judge Buchwald sensibly held that for a work to receive DMCA protection through the use of TPM, the work itself has to be one capable of protection under US copyright law. If a work is not<sup>23</sup>, then neither the circumvention of, nor trafficking in circumvention technology to thwart any TPM deployed to protect it will contravene the DMCA. It is submitted that such reasoning can be sensibly extended to copy control restrictions on works in which copyright has expired. However, given the recent, 20-year expansion of copyright duration brought about by the ‘Mickey Mouse Protection Act’<sup>24</sup>, and the suggestion that an obvious loophole may lie in the bundling together of copyright and non-copyright material (Craddock & McCullagh 2005:168) - thus resurrecting copyright term in a rather procrustean manner - realisation of permitted

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licence offered by Lawrence Lessig as a collaborative alternative to traditional copyright, affectionately calls it - is not only a cadence to arms against business practice seeking to profit from the creative endeavours of others, but another welcome advent of the Internet age.

<sup>15</sup> 17 U.S.C. §1201(a)(2).

<sup>16</sup> 17 U.S.C. §1201(b)(1).

<sup>17</sup> 17 U.S.C. §1201(c)(1).

<sup>18</sup> *Universal City Studios v. Reimerdes* 111 F.Supp.2d294(S.D.N.Y.2000) and *RealNetworks, Inc. v. Streambox, Inc.* 2000WL127311(W.D.Wash.2000).

<sup>19</sup> *US v. Elcom, Ltd.* N.D.Cal., No.CR01-20138RMW 5/8/02.

<sup>20</sup> *Ibid.* p.11.

<sup>21</sup> *Ibid.*

<sup>22</sup> 2004 U.S. Dist. LEXIS 2673 (albeit regarding databases, to which copyright law does not apply).

<sup>23</sup> As was proven to be the case with databases.

<sup>24</sup> Sonny Bono Copyright Term Extension Act 1998 (‘CTEA’).

exceptions to the copyright regime, may once again, prove a long time in coming. To this end the business practices of public domain profiteers such as 'Disney Corporation'<sup>25</sup>, – one of the largest lobby groups behind the CTEA - provide an apropos illustration. Lest we not forget, the birth of Disney (with the release of 'Steamboat Willie' on 18 November 1928) pre-dated the VCR, the DVD and the Peer-To-Peer. I have never seen the cartoon in its entirety; only fleeting glimpses of Mickey serving as helmsman of his steamboat, that have been deemed representative of the motion picture by almost every television documentary charting cartoon history. 'Steamboat Willie's' copyright term was set to expire in 2003. Luckily (for Disney Corp.), its IP is now protected from any possibility of penetrating the public domain until 2023, furnishing them with a further 20 years to digitally restore their cine film, release it online and on DVD in a read-only format<sup>26</sup> and cream off the profits of nostalgia indefinitely<sup>27</sup>. I have faith that in 2023 someone with the capability to acquire a digitised copy of 'Steamboat Willie', will circumvent its TPM, and make it freely available online (on Peer-To-Peer networks, and at no cost)<sup>28</sup>. Whilst the endeavours of such an actor will effectively set 'Steamboat Willie' free to percolate into the public domain, he will undoubtedly fall as a martyr to his cause. Despite such actions being in the public good (in the both the public interest, and as a 'public good', in its economic sense) and a permissible exception to TPM-protected works in which copyright term no longer exists – the stand-alone offence of circumvention per se, and its threat of imprisonment, will either dissuade him from a noble act<sup>29</sup> or reprimand him as one would a 'hacker'. While the entertainment industry generally, and Disney specifically, benefit from the new laws, the losers are less well defined; after all 'you can still read books, use the Internet, and watch Mickey Mouse' (Halbert 2005:13), albeit through another damaging concomitant of TPM referred to as 'economic acquiescence'<sup>30</sup>. As the enforcement of copyright law becomes prioritised and sharing becomes illegal, the public will lose a freedom they may not even realise they had (Halbert 2005:15).

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<sup>25</sup> Who, it is submitted, already have a lengthy history of profiteering in the public domain: namely in the pillaging and re-branding of folk-legends (Sleeping Beauty, Cinderella, etc). When the public domain facilitated the realisation of Walt's dreams Disney Corp. was happy. With the passing of the CTEA, and Machiavellian disregard for a public domain that helped make them 'what they are' Disney is happy once again; having effectively 'changed the rules of the copyright game' to further protect their economic interests.

<sup>26</sup> Rife with all-encompassing TPM.

<sup>27</sup> Given that the stand-alone proscriptions on anti-circumvention contained within the DMCA, unless repealed, remain in force post-2023.

<sup>28</sup> 'Once it is dispersed hither and thither, it can be impossible to retrieve. If a digital copy of The Lion King ever gets distributed over the Internet, Disney will not be able to delete all the copies' (Schneier 2000:25). As decentralised distribution is a natural law of the internet, TPM remains the only vanguard of Disney's desire to forever-profit from its IP.

<sup>29</sup> Namely, the act of sharing.

<sup>30</sup> It is submitted that Susan Bielstein's argument - that economic acquiescence with a particular business model promulgates a misleading belief that public domain works require rightholder permission – usually combined with an unnecessary, but not unreasonable looking fee – in pursuance of a legitimate copyright exception (Bielstein 2006:10-33) - can be extended to TPM, as technological guardians of the rightholder's preferred business model.

These proscriptions in the DMCA are not without their noted limitations. In striving to strike a reasonable balance Congress introduced<sup>31</sup> a closed list of narrowly defined exceptions to the prohibition of circumventing access controls and the trafficking in devices that circumvent both access and copy controls. These exceptions however, have been tailored to specifically justify their inclusion, and are narrowly confined to purposes such as law enforcement, national security and encryption research, so as not to compromise the adequacy and effectiveness of the TPM employed. The DMCA also introduces an administrative rulemaking procedure into The Code<sup>32</sup> whereby the Copyright Office will conduct a tri-annual assessment of access control mechanisms that adversely affect the ability to make non-infringing use of such works: however, these too, have only been granted subsequent exemption in specific, technical instances such as malfunction, or lists of websites blocked by filtering software.

Evidently, exempting the trafficking in devices that would allow circumvention of copy control mechanisms for the purpose of fair use will provide substantially more people with the tools to do so than the limited number of technical experts and government representatives the DMCA seeks to confine this know-how to. Tangible crowbars remain 'on-the-shelf': their technological equivalent, on the 'black-market'.

### Digital Agenda Act

After the DMCA, Australia was the second country to bring its copyright law into the digital age, with the Australian Federal Parliament enactment of the Digital Agenda Act 2000 ('DAA'). Although not party to the WIPO Treaties, the Australian amendments provide a pertinent comparison to the DMCA, in particular to the introduction of anti-circumvention protection. From the onset, it can be noted that the protection afforded TPM in the DAA is narrower than The DMCA (albeit only regarding access controls) in that it does not prohibit the use of circumvention devices *per se*, only the manufacture and distribution of said devices<sup>33</sup>, presenting a clear recognition that prohibiting the use of such devices would be more easily and effectively achieved through targeting the circumvention industry, rather than individual users (Craddock 2005:168).

In startling comparison to The DMCA, The DAA offers no exception provisions in relation to fair use for a work protected by TPM, providing substantially less protection for the rights of such users. However, it has been submitted that The DAA may ultimately become a carbon-copy of the DMCA in light of the recently agreed Free Trade Agreement (FTA) between the respective governments (Craddock & McCullagh 2005: 169-170). Given that the overreaching goal of the FTA is to harmonise the IP regimes of both countries, it appears highly likely that Australia will be required to extend its circumvention proscriptions to individual users to be fully

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<sup>31</sup> 17 U.S.C. §1201(d)-(j).

<sup>32</sup> 17 U.S.C. §1201(a)(1)(B)-(E).

<sup>33</sup> §116 A (1) Copyright Act 1968.

compliant with the Agreement<sup>34</sup>. It is further submitted - that in the face of extensive rightholder lobbying - extending the provisions of the DAA to further encapsulate fair use privileges may not prove to be as pressing a need for harmonisation as the extension of a circumvention ban to individuals.

### Directive 2001/29/EC

The EU Copyright Directive<sup>35</sup> ('The Directive'), eventually adopted by the European Parliament and the Council of the European Union on 22 May, 2001 - and entering into force on 22 June, 2001 - also sought to bring the EU in line with their respective obligations under Art.11 WCT and Art.18 WPT, and to harmonise the Member States' national legal framework on copyright and related rights to ensure that competition in the internal market remains undistorted (Foged 2002:534). Given that Directives are not 'directly applicable', national implementing measures were required of the Member States to give The Directive full effect. The deadline for implementation was optimistically set for 22 December, 2002, though it was only successfully met by Denmark and Greece. It should be noted from the onset that the passage of The Directive was not unproblematic. Faced with strong opposition from rightholders and the European Parliament<sup>36</sup>, the original, *laissez-faire* position of the Commission (that Member States themselves should be free to introduce and maintain exceptions to private copying, and that there was no imperative need to distinguish between digital and analogue technology) was reconsidered. In an information society, the distinction between analogue and digital copying is crucial: remuneration schemes through media levies have proven to be the only effective means of tackling analogue home taping, but no levy system, however sophisticated can effectively remunerate rightholders for digital copying and peer distribution over the Internet<sup>37</sup>. Returning on 25 May 1999, after an in-depth study of the problems of private copying since the early 1980s, the Commission published an amended proposal<sup>38</sup> tackling both analogue and digital private copying. Further problems arose on 25 May 2000 when the Council of Ministers refused to accept the 'Common Position' of the Committee of Permanent Representatives with regard to the balance of rightholder/exception-beneficiary interests. Prolonged debate on this relationship between technical lock-ups and limitations to copyright were so intense they were nearly the breaking point of the whole Directive (Dusollier 2003:68-69).

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<sup>34</sup> FTA Ch.17.4 Para.7

<sup>35</sup> 2001/29/EC.

<sup>36</sup> European Parliament Opinion (1<sup>st</sup> Reading), 10 February 1999, OJ C150/154.

<sup>37</sup> See: Net Magazine, Issue 154, September 2006, 'Is an ISP Tax Really the Best Way to End Illegal Filesharing?' for a multi-disciplinary discussion of ISP, mobile phone company, and device manufacturer taxation as a means of remuneration for online piracy.

<sup>38</sup> COM(99) 250 final; [1999] O.J. C180/6.

The bulk of the provisions pertaining to the protection of TPM are to be found in Art.6. Art.6(1) and Art.6(2) of The Directive set out the initial scope of the protection to be afforded TPM as defined in Art.6(3). Art.6(1) requires Member States to provide 'adequate legal protection against the circumvention of any effective technological measures' introducing a subjective limitation distinct from the DMCA that circumvention be carried out '...with knowledge, or with reasonable grounds to know' that it is being done so. This language implies that mere negligence is insufficient; rather gross negligence or intent is required (Bäsler 2003:12-13). The proscriptions on trafficking in circumvention devices found in Art.6(2) are substantially the same as those contained in §1201(a)(2) and §1201(b)(1) of the DMCA, once again obliging Member States to impose a blanket ban on the trafficking of such devices and services<sup>39</sup>. 'Art.6 of the Directive concerns the legal protection against circumvention of effective technological measures designed to prevent or restrict unauthorised acts. Art.6(2) requires Member States to provide adequate legal protection...A clue to what adequate legal protection might be is given by Art.8 of the Directive which requires Member States to provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in the Directive, such sanctions to be effective, proportionate and dissuasive (the 'three-step' test)' (Bainbridge 2004:364). A further 'clue' (Bainbridge 2004:364) as to what the 'adequate legal protection' required by Art.6(1) and Art.6(2) might actually be, can be found in the Art.8(1) assertion that they must be 'effective, proportionate and dissuasive', and must afford rightholders the position to apply for an injunction against third party intermediaries<sup>40</sup>, such as Internet Service Providers ('ISPs').

Art.6(3) of The Directive defines 'technical measures' and when they shall be deemed 'effective' in a similar manner to §1201(a)(3)(B) and §1201(b)(2)(B) of the DMCA. Here, Séverine Dusollier is as emphatic about The Directive as she is about the DMCA in stressing '[o]ne could not dream of a better tautology: obviously, since the rightholder has decided to technically protect an act of use related to his or her work, it means that he or she was willing not to authorise such an act' (Dusollier 2005:203) and that any TPM employed by a rightholder, are TPM to be protected from circumvention. It can also be observed that Art.6(3) fails to fully implement Art.11 WCT by omitting the final adjunct 'or permitted at law'. As noted above, this adjunct serves to emphasise that works in which copyright term has expired fall outside the scope of the anti-circumvention proscriptions. However, in only prohibiting circumvention 'not authorised by the rightholder', from the onset, The Directive appears to ignore the possibility that national law may already justify circumvention, truncating copyrights role in the balancing of appropriate entitlements, leaving the matter to be concluded by the sound commercial interests of the rightholders. The strict wording of Art.6(3) is further problematic in not requiring the authorisation of all the rightholders in a work for an individual rightholder to effectively protect it through

<sup>39</sup> Given that Art.6(2) is not mentioned in Art.6(4) (discussed later) it could be concluded that Art.6(2) establishes strict liability proscriptions on trafficking that Member States cannot chose to later exempt in national legislation (Braun 2003:499).

<sup>40</sup> Art.8(3).

TPM. Such a wide interpretation of 'rightholders' appears to be contrary to the underlying objectives of the WIPO Treaties and The Directive to protect TPM (Braun 2003:499). In this respect The Directive can be seen as primarily geared towards protecting the rights and interests of the 'main players' in the information industry, not the creators that provide the actual content driving their industry (Hugenholtz 2000:502). The interpretation of Art.6(3) also hinges on its assertion that a measure will only be deemed 'effective' if it 'achieves the protection objective'. It has been somewhat obviously asserted by Nicola Braun that this objective 'cannot be that the technological measure is infallible in order to enjoy protection...[as]...[t]his would render the whole system of protection of technological measures otiose, as any technological measure that has been successfully circumvented would not be considered effective' (Braun 2003:499). However, it can be sensibly inferred from this assertion, that whilst it may be a natural law of digital content that TPM are inevitably more easy to 'crack' than a tangible 'safe' - which will rarely encounter enough skill to crack it - a TPM will be effective if it blocks 99.9 per cent of average users (Schneider 2001).

Many academics have also observed the wider reaching scope of The Directive in contradistinction to the DMCA, in not differentiating between access control and copy control measures (Bäsler 2003:11-12; Braun 2003:498; Dusollier 2003:70; and, Craig & Graham 2003:360). However, it is submitted that in failing to at least distinguish what has been referred to above as outright theft, and copyright infringement, a more damaging discourse of rapacious circumventers is perpetuated than under the DMCA, by bundling the varied motivations of the outright thief and the cryptography student (neither of which care for copyright infringement) and the rapacious pirate and the fair user (neither of which need to access a work they already own) into the same perceived threat from the onset, regardless of any rights and defences that may later arise.

The major difference between The Directive and the DMCA however, lies in Art.6(4), designed to address the difficulties faced by the beneficiary of a copyright exception who is restricted from making use of that exception when the content is protected by TPM (Braun 2003:499). Art.6(4) only applies to the anti-circumvention proscriptions of Art.6(1) and - similar to the DMCA - does not extend to the anti-trafficking prohibitions of Art.6(2). Member States are obliged to 'take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation...the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation...where that beneficiary has legal access to the protected work or subject-matter concerned'. Not only does this prevent rightholders from remaining 'passive' (Braun 2003:499) to the rights of exception-beneficiaries - as the DMCA permits - but it radically purports to 'tip the balance in favour of the users seeking to exercise their rights, before the onset of sanctions against circumvention' by giving them 'a positive meaning and not only a defensive nature' (Dusollier 2003:63). In practice however, Art.6(4) is nowhere near as radical as it would appear to be: its initial emphasis is to entrust 'voluntary measures taken by rightholders, including agreements' with the safeguarding of these exceptions. Here



the intervention of the lawmaker is seen as subsidiary; voluntary measures undertaken by rightholders as the preferred solution (Dusollier 2003:62). Art.6(4), unfortunately, is unclear as to what form these 'appropriate measures' and 'means of benefiting' should take, and leaves the ultimate decision in the hands of the implementing Member States. However, some conclusions can be drawn from the typography of Art.6(4) itself. A beneficiary must have 'legal access to the protected work' and therefore, does not extend to the circumvention of access control TPM. Secondly, the 'means of benefiting' are limited only to the 'extent necessary to benefit from the exception' and thus, rightholders need not enable unrestricted use of the content (Braun 2003:500). Any attempt at defining the vagaries of the voluntary measures and agreements preferred is not to be found within The Directive<sup>41</sup>, though it has been submitted, by gleaning examples from the legislative history of The Directive, that 'building copyright exceptions by design', and providing some leeway through licensing and business models, are obvious omissions that would better protect exceptions in a private orderings model than a public and democratic law-making process (Dusollier 2003:72). 'The carrot lies in mandating that beneficiaries have legal access to the work in question...the stick manifests itself in the form of government intervention should rightholders prove not to be up to the task' (Ganley 2004:327). Therefore, if implemented properly, Art.6(4) can aid the finding of solutions between the rightholders and beneficiaries of exceptions themselves, without damaging the effective protection of the technical measures (Braun 2003:499) that would result from such collusion.

Put simply, the use of the 'key' by lawful users is not prohibited, but how are lawful users to get the 'key' in the first place, if its provision remains restricted? (Craig & Graham 2003:361). Whilst the general thrust of the DMCA for beneficiaries is 'circumvent-we-do-not-sue' (Dusollier 2003:72) the language of The Directive is clearer in dissuading self-help; Member States themselves must ensure rightholders provide the beneficiary with the appropriate means to do so.

### ***Exceptions and Limitations to Copyright in 'The Directive'***

Art.6(4) distinguishes between a broader category of 'public policy' exceptions<sup>42</sup> and a single 'private copying' exception<sup>43</sup>. Member States are only obliged to legislate on the former, and may *choose* to legislate on the latter. For the purpose of harmonisation across the EU the list of exceptions found in Art.5 is exhaustive; Member States are not permitted to legislate further than those exceptions cited within The Directive. Yet, the WIPO Treaties explicitly recognised that in the digital environment, further exceptions to copyright, and limitations to the copyright owner's exclusive rights, will undoubtedly, be required (Ganley 2004:312). This 'closed' list system also differs substantially from the 'open' system of the US where an adaptive fair use doctrine

<sup>41</sup> Recital 51, where this assertion is reiterated, unfortunately, provides no further clues.

<sup>42</sup> Arts.5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) and (3)(e).

<sup>43</sup> Art.5(2)(b).

allows copyright limitations to evolve from a real-time, legal balancing act. However, under the 'closed' list of exemptions contained within The Directive, the process by which new exceptions and limitations are assented<sup>44</sup>, as there inevitably will be - given the rapid pace of technological advancement - will leave the evolutionary claims of such beneficiaries in the EU at a staggered disadvantage. Six years prior to the assent of The Directive, the Supreme Court of the Netherlands held<sup>45</sup>, considering themselves fully entitled to extend an exhaustive list of copyright exceptions, that in embodying a balance of private and collective interests, copyright rationale can never consider a list of exceptions to be effectively closed. However, it is submitted that The Directive no longer permits the courts of its Member States to take such considerations into their own hands: unless instigated through Art.12(1) they would be in contravention of their obligations under The Directive (Bäsler 2003:23). 'Now, thanks to The Directive, if some unforeseen use that we all agree should be exempted emerges, we'll have to wait at least three years<sup>46</sup>, if not longer, for The Directive to be amended' (Hugenholtz 2000:501).

Given that the underlying intention of The Directive was to harmonise exceptions across the EU it is somewhat otiose that of the 23 enshrined in Art.5(1)-(3), only the temporary copying exception set out in Art.5(1) requires mandatory implementation. It must also be noted, that under Art.5(5), all the exceptions contained therein are to be interpreted in light of the 'three-step-test' under Art.9 Berne (backed up by Art.13 TRIPS), namely, restricted to 'special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.' It has been largely assumed that the 'legitimate interests of the rightholder' are economic (Bainbridge 2004:366) though it should borne in mind, that conflating this limb of the Berne test with economic detriment, does nothing to further the rationale that innovation is not necessarily economy-dependent - copyright policy must eschew a construct of value premised simply on the idea of consumption (Ganley 2004:306) - but does everything for the 'copyright optimists' (Goldstein 2003:10-11) who seek to ensure all value that can be derived from their property is captured.

### ***Public Policy Exceptions***

Neither The Directive, nor its legislative history, posit any explanation as to why some exceptions were preferentially included whilst others were not. It has been suggested that those included conveyed strong public interests, such as fundamental freedoms: yet neither the exception of parody, which is a persuasive illustration of freedom of expression, nor the exception for news reporting, which translates concerns over freedoms of information and the press, are included in the 'closed' list (Dusollier

<sup>44</sup> Art.12(1) reports on the application of Art.5 exceptions (*inter alia*) are to be submitted to the European Parliament, The Council and the Economic and Social Committee every 3 years.

<sup>45</sup> *Dior v. Evora*, Hoge Raad, 20 October 1995, N.J.1996No.682.

<sup>46</sup> A very long time when exponential-technological-advancement is concerned.

2003:75). Those listed are specifically tailored to accommodate the working practices of established institutions such as libraries, broadcasters and places of education; the provisions absent, namely exceptions for parody, criticism, review and news reporting, however, are amongst the most important for transformative uses (Ganley 2004:314) of copyright protected works. It has been posited that the comparative ease with which beneficiaries of these exceptions can be identified was another key factor in determining which were included and which weren't, though again, this claim isn't wholly convincing: What about the reprography exception whose users are potentially any member of the public? Why is the news reporting exception, whose beneficiaries (i.e. the press and reporters) could be easily identified, not included in the list? (Dusollier 2003:75).

### ***The 'Private Copy' Exception***

This obligation on Member States extends to all the exceptions found in Art.5(2) bar the private copy exception of Art.5(2)(b) which is made optional in the second indent of Art.6(4): 'A Member State *may*...take such measures' subject to the caveat that they cannot prevent rightholders from adopting 'adequate measures regarding the number of reproductions'. Only in default of such measures may Member States act, but nothing in The Directive indicates when a default from the side of the rightholder would be sufficiently patent to permit state intervention: it would seem that any minimal measure prevents the Member State from choosing to safeguard this public interest, and ultimately gives too much of an unrestrained power to the rightholder (Dusollier 2003:75). Art.5(2)(b) beneficiaries cannot seek the aid of The Directive if 'reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned'<sup>47</sup>, providing a loophole for rightholders to limit private copying to a small number. If the reproduction of content for private use has not been made possible by the rightholder to the minimum extent necessary to benefit from the exception, then the 'three-step-test' of Art.5 must be taken into consideration.

### ***Exclusion of 'On-Demand' Services***

Finally, the fourth indent of Art.6(4) problematically states that the any measure pursued by Member States to aid the beneficiary of an exception 'shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them'<sup>48</sup>. One instance in which this may prove applicable is

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<sup>47</sup> Art.6(4) 4<sup>th</sup> indent.

<sup>48</sup> It is submitted that the author cannot perceive a better parlance for the workings of the World Wide Web itself, where everyday information-exchanges are made available, subject to standard-form click-wrap contracts pertaining to their use, in a way that members of the public may access it from a place and time individually chosen by them.

under new business models proposed by the music industry, in which a large quantity of music will be made available to you for a limited period of time, e.g. a weekend where you intend to organise a wedding, a funeral, or both. It was thus lobbied by the International Federation of Phonogram and Videogram Producers ('IFPI') that applying the exceptions contained within The Directive<sup>49</sup> to such new business models would render them otiose (Dusollier 2003:76). *Prima facie*, this submission is unproblematic. As Séverine Dusollier vibrantly illustrates 'If Warner Music 'lends' you Björk for your birthday party, it does not mean you can keep her any longer unfortunately. If a technical device obliges Björk to go home<sup>50</sup> once the party is over and other guests have left, you cannot rely on Art.6(4) to force Warner Music to change the rules of the game' (Dusollier 2003:76). It is submitted however, that this example is nothing more than music industry rhetoric. In essence, what is really being provided is hired music. If you do not own it you cannot make a private copy of it. But, we're not talking about Björk as a rivalrous commodity (ok, so only a few festivals were lucky enough to host her physical presence this summer), we're talking about a non-rivalrous digitisation of Björk ('If you hear a symphony by Mozart, you do not prevent others from enjoying it' (Elkin-Koren & Salzberger 2004:51)). However, this unequivocal endorsement by The Directive fails to consider potential beneficiaries of works that are made available on a contractual basis so that members of the public may access them from a place and at a time individually chosen by them, such as Lexis Nexis and Westlaw. Should their rightholders decide to place copy-control or print-control TPM on their documents, they will find protection in a public law framework that effectively takes copyright protection away from its current 'creativity standard' and returns it to the 'point of publication standard' of yesteryear<sup>51</sup>. We will be left with no option but to pursue futile legal action, resign ourselves to the prospect of using our CPUs as a one-stop shop for viewing legal documentation, and tediously transcribe quotations without the aid of time-saving, 'cut and paste' devices. It is thus submitted that Westlaw would not remain in the market for very long should it decide to disable such measures, but lest we not forget, their market is the provision of access to academia, not mistakenly conflating every illegal download with a 'lost sale' and making that sale count. Art.9 and Recital 30 also underscore that the Directive is without prejudice to the law of contract. The misguided belief that a contract regime will generate the optimal set of rules for information use assumes that contracts are voluntarily entered, reflect the bilateral assent of the parties, and occur in a competitive market: in fact, none of these conditions are met when 'standard form' contracts can be so easily used to impose overly-restrictive terms on access to information (Elkin-Koren 2001:195). It is thus submitted, that this indent presents a vague loophole for those who wish to extend their control over a copyright work even further in the digital world: the technology to fully exploit it, by making on-demand provision of works on

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<sup>49</sup> Namely, Art.5(2)(b).

<sup>50</sup> Or 'self-destruct'.

<sup>51</sup> It is submitted that whilst the © title remains vested in the author at the point of creation, it is the 'Information Intermediaries' (akin to publishers of the past) that actually control the rights to the IP they make available through the TPM contained therein.

the Internet a standard is already available. Such contractual measures have the same 'take it or leave it' approach as TPM in that they both permit no variation of terms governing access and use (Foged 2002:525). The requirement that such services must be delivered on contractual terms is trifling, given the technological ease in which 'click-wrap' licenses and 'standard form' contracts have been embedded in digital products to date, and when assenting to an agreement to obtain access to works made available on-line/demand, users may be inadvertently signing<sup>52</sup> away the (limited) protection of Art.6(4) itself. It may ring true that restrictive terms can be challenged before the court but they do not present a 'lesser problem' than overly restrictive TPM because of it (Elkin-Koren 2001:192-193). Even if successful, a court action would only invalidate the specific contract in question and would do little to aid the greater public.

It has been submitted by Bernt Hugenholtz, that a less ambitious European legislature might have easily achieved its goal by copying the provisions of the WIPO Treaties; but in its ambition to set the copyright norms of the world, the European Commission chose not to settle for the level of protection agreed upon at WIPO level, but to raise the standard (Hugenholtz 2001:501). In contradistinction with the 6-year deliberation afforded the Database Directive<sup>53</sup>, and incessant pressure from US rightholders, The Directive was regrettably rushed, leaving its vagaries to inevitably fall before the European Court of Justice ('ECJ') for clarification. It has also been submitted that one of the best ways of removing this monstrosity would be to challenge its legal basis pursuant to Art.230 (ex 173) EC Treaty: founded on the same EC Treaty Articles<sup>54</sup> as the Tobacco Advertising Directive<sup>55</sup> successfully challenged by Germany<sup>56</sup>. His services have been offered *pro bono* to anyone wishing to take up the gauntlet (Hugenholtz 2001:502).

### Copyright, Designs & Patents Act

Failing to meet the 22 December 2002 deadline, the UK finally implemented The Directive on 31 October 2003, inserting sections 296ZA to 296ZF into the Copyright, Designs and Patents Act 1988 ('CDPA') via the Copyright and Related Rights Regulations 2003 ('The Regulations'). It is worth noting that before the transposition of The Directive, the CDPA already afforded TPM a protection analogous to that offered under the DMCA in considering circumvention a proscribed form of copyright infringement under s.296CDPA. 'Before the changes implemented by the Regulations, s.296CDPA treated the making, importing, sale, hire, offering, exposing or advertising for sale or hire, devices designed or adapted to overcome copy-protection (or publishing information to enable or assist persons doing this) as an infringement of

<sup>52</sup> Or should that be 'yes-I accept these terms which I haven't read-clicking'?

<sup>53</sup> Directive 96/9/EC.

<sup>54</sup> 47.2, 55 and 99 (ex articles 57.2, 66 and 100A).

<sup>55</sup> 98/43/EC.

<sup>56</sup> *Germany v. European Parliament and Council of the EU*, Case C-376/98.

copyright...Now, for works of copyright other than computer programs, these provisions have been substantially modified and extended to other subject matter such as performances and the database right' (Bainbridge 2004:364). However, such a preferential consideration can only be mourned in light of the new approach mandated by The Directive, which goes further than the existing CDPA protection, which restricted the dealing in devices 'specifically designed or adapted to' circumvent copy protection, but not the act of circumvention itself (Craig 2003:360) with the introduction of criminal sanctions for circumvention of TPM for the first time in English law (Bainbridge 2004:364).

Art.3 of The Directive has been implemented through an extension of s.20CDPA to include the right to control 'communication to the public' via electronic transmission, which now includes broadcasting and 'on-demand' services through 'making available to the public of a work in such a way that members of the public may access it from a place and at a time individually chosen by them'. As we have also seen was the case in the assent of The Directive, the UK Government did not feel that it was necessary, or appropriate, to include provisions addressing when an act of 'making available' is considered to have taken place (Hart 2004:254) Whilst it has been submitted that this provision might serve as a warning sign to rightholders to take reasonable account of the exceptions under the CDPA when designing their TPM (Hart 2004:256) as I have asserted above, without teeth, and with the exclusion of 'on-demand' services, this is wholly optimistic.

The mandatory exception of Art.5(1) has been implemented through amendment of the CDPA<sup>57</sup>, excluding computer programs. Regarding computer programs it is to be noted that the original s.296CDPA has been retained in substance, the pre-existing proscriptions on circumvention have only been amended to conform to the 'style' of the new provisions contained in The Directive<sup>58</sup>. As the CDPA already contained a large number of exceptions, none of the optional exceptions contained within Art.5(2)-(3) were furthered in The Regulations, and in order to achieve compliance with The Directive many of the existing exceptions were, in fact, narrowed (Hart 2004:255). Despite heavy lobbying from rightholder groups, the UK government also deemed it unnecessary to explicitly transpose the Berne 'three-step-test' - found in Art.5(5) - directly into the CDPA<sup>59</sup>, taking the not unreasonable view that as all the exceptions contained therein were already drafted in accordance with Berne, it would be counterproductive to permit them periodic reassessment before the courts (Hart 2004:255).

The situation established in the second indent of Art.6(4) regarding the private copying exception exists in all Member States bar the UK and Ireland. Contrary to common belief, the expansive market for blank, recordable DVDs, and the free dissemination of software to do so over the Internet, there is no legal right to make back-up copies of legally purchased DVDs for private use in the UK. Whether or not a

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<sup>57</sup> s.28(a)CDPA.

<sup>58</sup> E.g., by broadening the definition of those who can take action.

<sup>59</sup> Though, this was done by Italy and Greece.

UK court finds<sup>60</sup> DVDs to be films (in which the CDPA only permits back-up copies to be made if there is a reasonable assumption that copyright in the film has expired<sup>61</sup>) or computer programs (where back-up copies are permitted only where they are *necessary* for the purposes of lawful use<sup>62</sup>) it has been cogently argued that copying DVDs - TPM protected or otherwise - is legally impermissible, full stop: 'if you spoil your DVD you have to go and buy another...backups are not *necessary* at all' (Esler & Nash 2003:488 *emphasis added*). Furthermore, the decision of the UK legislature to extend such prohibitions to the engineers, traffickers and private users of devices that make CSS circumvention and DVD burning possible, by simply choosing not to give effect to Art.5(2)(b) can be seen to further this end (Esler & Nash 2003:489).

Regarding the 'appropriate measures' Member States are obliged to take should TPM prevent the exercise of a legitimate exception under The Directive (or 'permitted act' under the CDPA<sup>63</sup>) such persons affected, or a representative of a class of such persons, is entitled to submit a formal complaint to the Secretary of State<sup>64</sup>. Should the Secretary of State find in their favour, he may issue a direction to the rightholder to ensure the user concerned can benefit from the permitted act: failure to follow this direction will lead to a breach of statutory duty, upon which the user/representative will be able to pursue recourse before the courts (Hart 2004:256). The use of an external decision maker in this way has the advantage of affording proposed users a subjective determination of the sort *ex ante* technical parameters disfavour (Ganley 2004:328). However, not only does such an approach look clumsy; it could prove unworkable in practice. The cost and time involved in pursuing such an action, and the ultimate discretion of the Secretary of State both serve as hefty deterrents to many beneficiaries.

Whilst the act of circumvention itself does not give rise to sanctions *per se*, under the new provisions of the CDPA it is now a criminal offence to make or deal in circumvention devices: and a further civil action is available to the copyright owner in this respect. Whilst the majority of these offences require such manufacture and distribution to be carried out in the course of a business, in two cases all that is required is that the distribution/service is prejudicial to the rightholder. Furthermore this is an offence of strict liability. The prosecution need not prove *mens rea*, and from the case of *R v. Johnstone*<sup>65</sup> it appears that placing such a persuasive burden on the defence does not breach the right to a fair trial under Art.6 of the European Human Rights Convention on Human Rights and Fundamental Freedoms ('ECHR'), and does not conflict with their presumption of innocence. 'Arguably, this could apply in a situation where academics seek to publish the results of their research into encryption

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<sup>60</sup> At present, no case has been brought forward on this point.

<sup>61</sup> s.66(a)CDPA.

<sup>62</sup> s.50(a)CDPA.

<sup>63</sup> Not all of the 'permitted acts' fall within the 'protection' offered under s296zeCDPA. Those which do can be found in the new Schedule 5A to the Act. Notable omissions include incidental inclusion and fair dealing for criticism, review or the reporting of current events.

<sup>64</sup> s.296zeCDPA.

<sup>65</sup> [2003] FSR 42.

technology (despite the acts of circumvention itself being permitted under the CDPA) if doing so could be described as the provision of a service' (Bainbridge 2004:367). It is a defence to anyone faced with such accusations, if it can be proven that he did not, or had no reasonable grounds to, believe that the devices enabled or facilitated circumvention. This defence has been extended to include 'communication to the public' as well as mere 'distribution'. A further defence may also fall under Art.10 of the ECHR as implemented by the Human Rights Act 1998 ('HRA'). However, the competing rights of others must always be carefully weighed against the public interest in Art.10 considerations, which could also include the IP rights of those applying TPM to prevent unauthorised access to, or use of their works (Bainbridge 2004:367). In the past it has been undisputed that libraries, for example are open to the public, and it has been submitted that if the libraries of the future are to be found on global networks<sup>66</sup>, the Government might accept that access to information depends upon the discretion of any controlling provider (Weber 2001:184). What remains important is that such information remains freely available, though not necessarily free of charge. The fact that public libraries appear<sup>67</sup> to offer both benefits should not be used to advocate free access at no cost, to works hosted online. Yet, as previously eluded to, in the context of 'Freedom of Information' and the DMCA, given the low overheads, collaborative capabilities and technological advances facilitating the increased dissemination of works online, the realisation of a 'freedom of expression at freedom of expense' will not be long in coming.

## Germany

Germany's implementation of The Directive was through the 'Law for the Regulation of Copyright in the Information Society' ('UrhG') on August 16, 2002, leading in turn to the government's 'Bill for the Regulation of Copyright Law in the Information Society' and subsequent amendment of the German Copyright Act 1965<sup>68</sup> when it entered into force on September 13, 2003.

The provisions of Art.6 of The Directive are to be found in the new sections 95a and 95b UrhG, ranging from near identical to verbatim implementation of their respective sections in The Directive (Bäsler 2003:17-20).

One of the most important limitations on the protection of TPM is that the protection afforded by s.95a only extends to works that are either protected by copyright or otherwise protected under the UrhG; it therefore does not apply to works not protected by copyright or in the public domain. s.95b(2) provides individuals wishing to benefit from one of the s.95b(1) exceptions with an individual claim against the rightholder, who bears all legal costs should the beneficiary prove successful. Whilst this route is certainly more direct than the one mandated in the UK it is still

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<sup>66</sup> And ISPs such as Google

<sup>67</sup> In fact, 5p from every public loan goes directly back to the author, and considerably more on audio and video loans.

<sup>68</sup> UrhG



burdensome, might take a long time, and binds the rightholder only in the individual case concerned (Bäsler 2003:21). In a perceived attempt to protect the rights of beneficiaries of the exceptions listed in s.95b(1), a new cause of action for group litigation has been extended to associations seeking to aid such beneficiaries through the 'Law on Actions for an Injunction' ('UKIG'). Again, injunctions are specific for the future and won't help initiating beneficiaries: a s.2aUKIG injunction only prohibits continued violation by the rightholder, unless it has a 'detering effect' (Bäsler 2003:22) that prompts the rightholder to self-initiate measures to fulfil his s.95bUrhG obligations.

Again, however, through the verbatim implementation of Art.6(4) of The Directive into s.95bUrhG an insufficiently deterred or malevolent rightholder can effectively deny the beneficiary of a legitimate exception convenient use by making the protected work available under a contractual agreement, aided once again by the commercial industries' new found friend, the 'click-wrap' licence. Whilst s.95b cannot be contracted out - the provisions contained therein are mandatory as mandated by the second sentence of s.95b(1) (Bäsler2003:21) - additional terms that serve to limit the convenience of the beneficial use and stipulate for excessive compensation are not afforded such protection. If they propose anything to address those exceptions, the lawmaker is no longer obliged to rule on the matter (Dusollier 2005:203). The Art.8 appropriate sanctions and remedies have also been implemented into s.108b(1)nr.1UrhG in the form of both criminal and civil liability.

## Overview

To date all EU Member States have implemented The Directive bar the Czech Republic (who have only implemented it in part). A full consideration of the legislative histories and enactments of these States is certainly outside the remit of this thesis; it would take a textbook to do justice to a discussion of them all. However, by focusing on a few national examples, several comparative trends can be observed.

In various instances, The Directive calls for the exercise of certain rights that have been alien until now for certain Member States. The system of 'fair dealings' or 'permitted exceptions' in the EU is dramatically different from that of 'fair use' in the US. Whilst the DMCA embraces a general doctrine of fair use that permits freely available uses (at no cost) deemed to be in the public good, the EU operates a more narrowly and specifically tailored system (often requiring compensation of the rightholder) that views exceptions to copyright as a market failure (Bäsler 2003:4) or a permitted tolerance on the part of the rightholder (Dusollier 2003:63). These exceptions and limitations, where use is only permissible against reasonable compensation, better resemble a compulsory license than fair use (Bäsler 2003:24).

Whilst the EU Member States look largely alike in operating a 'closed' list of copyright exceptions, overall harmonisation of these exceptions has proven difficult in light of numerous, already-present specificities in their national laws, and those offered optionally in The Directive. France knows no exceptions for research, education or

libraries; Germany, none for parody, though it does exempt communication of works at funerals and religious ceremonies<sup>69</sup>, whilst Belgium specifically exempts their Film Museum from making backup copies for the purpose of restoration (Dusollier 2003:63). In sharp contrast with the rest of the EEC, only the UK and Ireland offer no protection to those seeking to benefit from the optional, private copying exception of Art.5(2)(b), though the scope of the exception varies considerably throughout Europe, particularly regarding the requirement of a legal source, the number of copies that may be made, and the meaning of 'private' (Braun 2003:500).

Amidst all these different legislative traditions it is not surprising that effective harmonisation is yet to be achieved, though it is paradoxically confounding that in seeking such harmonisation the main thrust of The Directive is making mandatory the safeguarding of a 'closed' list of exceptions, the enactment of which (bar one) is voluntary. This sits somewhat uneasily against the *acquis communautaire* of both the Computer Program<sup>70</sup> and Database<sup>71</sup> Directives, where instead of the use of TPM being without prejudice to rights and exceptions; it is the exceptions that are without prejudice to the use of TPM (Heide 2000:224).

From looking at the UK, it has been observed that many of the problems contained within The Directive have percolated into national law. Sanctions restricting the abuses of rapacious Internet pirates is one thing, but it is quite another if criminal sanctions and civil liability restrict the ability of *bona fide* cryptographers and other academics from publishing their research (Bainbridge 2004:369). The loophole provided by the provision of 'on-demand' services has been unequivocally accepted by both legislatures, and correctly condemned by many academics: there is no justification for such an exception (Bäsler 2003:28-29). From The Directive's implementation process, it has been noted that the Member States have found it difficult to deal with the vagaries of Art.6(4) (Braun 2003:502), and it is submitted that it will not be long before the ECJ is asked for guidance on its interpretation. Given this uncertainty, several Member States have chosen to take a back seat - through their implementing legislation - by requiring aggrieved beneficiaries to initiate varying forms of administrative action to secure their entitlements (Ganley 2004:328). The two most difficult examples are illustrated by the legislative attempts of the UK - in offering recourse through government intervention (as discussed above) - and Germany, through a direct claim before the courts. It is submitted however, that some of the more preferable legislative attempts are to be found in Italy, Denmark and Greece, in respectively offering recourse through conciliation, mediation and arbitration mechanisms (Braun 2003:501) that are considerably less burdensome, legally binding, and more cost effective from the onset, than recourse to the courts, which can then be pursued as the last resort it should be.

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<sup>69</sup> Rendering that (previously discussed) provision of 'Björk-as-an-on-demand-service' to perform at your wedding, funeral, or both, wholly unattractive to the German market.

<sup>70</sup> 91/250/EEC.

<sup>71</sup> 96/9/EC.

## 5 Before The Law

### Who Controls the Control Men?

'Everyone wants access to the law,' says the man, 'how come, over all these years, no-one but me has asked to be let in?' The doorkeeper can see the man's come to his end, his hearing has faded, and so, so that he can be heard, he shouts to him: 'Nobody else could have got in this way, as this entrance was meant only for you. Now I'll go and close it.'

(Kafka 1925)

No one else could gain admittance here, because this entrance was meant solely for him. If he nevertheless remained outside, he has only himself to blame.

(Kozinski & Volokh 2005)

In Deleuze's *Postscript on Control Societies* he claims Kafka, best theorised the drift from disciplinarity to control in his parable of the man from the country in *The Trial*. 'Kafka, already standing at the point of transition between the two kinds of society, described in *The Trial* their most ominous judicial expressions: apparent acquittal (between two confinements) in disciplinary societies, and endless postponement in (constantly changing) control societies are two very different ways of doing things, and if our legal system is tottering, is itself breaking down, it's because we're going from one to the other' (Deleuze 1995:179). Taking this as my cue, I plan to critically analyse the effectiveness of having to go before the Secretary of State to gain access to a work protected by TPM in the UK (and the Librarian of Congress in the US). It has already been suggested that this may prove unworkable, and illustrates a somewhat perverse relation for the role of law in the sense that the Secretary of State ultimately has to ask for the 'key' from the rightholder, and that only individual applications will be heard, and therefore such action is incapable of setting a precedent for all. After discussing the intermediary role of the Secretary of State, I will then turn my attention to the perceived inefficiencies of other endeavours to ameliorate the problems posed by TPM, before the law. These can be briefly summarised as the recommendations of the

recent Gowers Review of Intellectual Property 2006 ('Gowers Review'), and the belief that fair use rights and permitted exceptions to copyright infringement can be 'baked' or 'coded' into TPM. I will then offer a brief analysis of Creative Commons. Whilst not specifically pertinent to TPM, Creative Commons licensing can be viewed as a tactic to improve our current copyright climate that operates within the confines of the law; not against it. I will then turn my attention to extra-legal endeavours to control the parameters of debate pertaining to TPM. After introducing the problematic myth of countercultural revolution as a rhetorical trope of anti-DRM<sup>1</sup> marketing strategies; I will discuss how both piracy discourses, and the private property paradigm, are as important to Deleuzo-Foucauldian Control, as the sanction-backed threat of legal action.

### Who Controls The Control Men

Quis Custodiet Ipsos Custodes?

(Juvenal: *Satire VI* c.346-348)

Who Controls The Control Men

(Burroughs: *Pistol Poem No. 2* 1994)

As we have already observed in chapter four, those seeking to make use of a permitted exception to copyright, that lack the ability to circumvent the TPM themselves, must make a request to the Secretary of State. The same rings true in the US. Those wishing to pursue legitimate fair use rights must do so through application to the Librarian of Congress. What can be observed from the onset, is that in enacting anti-circumvention, the state has shown a clear intention to 'abdicate' a large proportion of the juridical role of deciding on permitted exceptions to copyright and fair use to the private enterprises that employ TPM. Recalling Judith Butler's 'petty sovereigns' that emerge from a suspension of the rule of law, here we can observe a clear 'abdication' of the role of law to the 'market sovereigns' of free enterprise. Furthermore, such an undertaking can clearly be observed as compromising an inherent tension between the distributed diagram through which TPM exercises, and the hierarchical, centralised diagram of juridical rule - Hardt & Negri's aforementioned 'hybrid topography'. Whilst we can observe that those seeking to employ TPM have extensively lobbied for the sanction-backed threat of anti-circumvention as a means of 'making examples' of a small number of circumventers, the legislative assertion that the 'control men', can be controlled by the Secretary of State or the Librarian of Congress is somewhat otiose. Whilst the 'control men' appear to have successfully achieved everything their business plan desires, the Secretary of State and the Librarian of Congress have to ultimately ask the 'control men' to assist them in an undertaking that is clearly inimical to their business interests. Unfortunately, such an undertaking has not been pursued to

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<sup>1</sup> Please note that references to DRM (as a rhetorical trope) throughout this chapter are intentional.

date, further attesting to the success of both the self-dissuading -‘technology of self’, and the rational economic acquiescence, of TPM. Furthermore, it is submitted that if the bureaucratic nature of this process is anything like that of ‘Freedom of Information’ requests, our standing before the law on such matters may begin to resemble Kafka’s conception of ‘endless postponement’, and Butler’s ‘indefinite detention’ (albeit detained from without of the content we wish to access, rather than confined within a disciplinarity). Should the Secretary of State chose to stall such applications, for whatever reason, or should those with the TPM ‘keys’ either fail to promptly deliver them<sup>2</sup>, or undertake to make the provision of the requested content themselves, the fullest realisation of our permitted exceptions and fair use rights may prove a long time coming. Furthermore, it is worth noting that should the Secretary of State successfully broker a requested access, what could be perceived as a precedent of sorts for many others, remains nothing more than a personal precedent. As Kozinski & Volokh contend, in their fascinating reworking of Kafka’s *The Trial* with support from genuine legal precedent: ‘If he nevertheless remained outside, he has only himself to blame.’ In this respect, we might also observe recourse to the Secretary of State as yet another Foucauldian third ‘technology of power’, or Deleuzian Control. With the advent of TPM our personal modulations pertaining to fair use, and what European legal scholars generally refer to as ‘fair dealing’, has been *inverted*. Instead of copying what we deem ‘fair’ from the onset, and concerning ourselves with a legal determination afterwards (should it ever come back to haunt us), with TPM, it is the legal determination we must pursue from the onset, which may ultimately affect our choice of what to ‘fairly’ copy or not. It is submitted, therefore, that through this analysis the ‘control men’ have effectively ensured that they remain in control of both diagrams as they pertain to TPM. Redressing this imbalance is an imperative for our future.

In contradistinction to the bulk of cogent recommendations found in the long-anticipated Gowers Review one gets the impression that when it comes to TPM he has missed the point entirely. Before fully investigating his recommendations pertaining to TPM it is of importance that we initially list some of his more sensible recommendations. Firstly, he recognises that exceptions to copyright can create value, and that creating a private copy exception for the purpose of ‘format shifting’ will improve clarity in the law; observing that ‘[u]nder the Information Society Directive, countries are able to enact a private copying exception provided that ‘fair compensation’ is given to rights holders<sup>3</sup>’; ultimately recommending that we ‘[i]ntroduce a limited private copying exception by 2008 for format shifting for works published after the date that the law comes into effect’... [with] no accompanying levies for consumers’ (Gowers 2006:63) and that we ‘[e]nable libraries to format shift

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<sup>2</sup> After all, the key in the hands of someone else is no different to a circumvention device. Should the recipient of a key chose to post it online, in the same way some ‘crackers’ make the validation keys of certain ‘warez’ (cracked software) selectively available, that TPM will be rapidly compromised *en masse*. Whilst such an undertaking may ultimately hold such a trusted key holder liable for a communication/trafficking offence, once something is distributed into the network, nothing can be done to fully retrieve it.

<sup>3</sup> Art.5(2)(a) and (b) of Directive 2001/29/EC.

archival copies by 2008 to ensure records do not become obsolete<sup>4</sup> (Gowers 2006:66). Secondly, he observes that '[f]air dealing for the purposes of non-commercial research and private study, permitted by section 29 of the CDPA excludes copying sound recordings or film, which is inconsistent and adds to the cost of negotiating rights for sound recordings and films' and recommends we '[a]llow private copying for research to cover all forms of content' (Gowers 2006:63). Thirdly, whilst recognising that 'it would not be possible to create a copyright exception for transformative use...as it is not one of the exceptions set out as permitted in the Information Society Directive'<sup>5</sup> he ultimately proposes 'that Directive 2001/29/EC be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test'<sup>6</sup> (Gowers 2006:68). Fourth, and finally, noting that at present there is 'currently no exception in copyright to parody works' he observes '[t]he Information Society Directive specifically allows for 'caricature, parody or pastiche'<sup>7</sup> and ultimately 'recommends such an exception should be introduced into UK law' (Gowers 2006:68).

Whilst, it is submitted that these are all worthwhile recommendations, they may ultimately prove ineffective in light of his recommendations pertaining to TPM (which he inconsistently refers to as TPM, DRM and 'technological protection systems'). It is important to observe that he clearly underestimates the degree of control TPM affords from the onset, describing them as 'commonly used to disable the fast-forward button during the initial minutes of a DVD film' (Gowers 2006:28) for example. When he eventually recognises that the 'Information Society Directive recognises that DRMs may be used to prevent legitimate copying and Article 6(4) requires Member States to ensure that technical measures do not preclude a person from benefiting from certain copyright exceptions' he is quick to assert that '[t]his obligation has been implemented in UK law. If a person cannot exercise a permitted right due to a DRM, they must issue a 'notice of complaint' to the Secretary of State, who can then issue directions on how to ensure that the permitted act can be performed' (Gowers 2006:73). Ultimately conceding that this process is 'slow and cumbersome' he goes on to recommend that the Government '[m]ake it easier for users to file notice of complaints procedures relating to Digital Rights Management tools by providing an accessible web interface on the Patent Office website by 2008' (Gowers 2006:73) and that the Department of Trade and Industry ('DTI') 'should investigate the possibility of providing consumer guidance on DRM systems through a labelling convention without imposing unnecessary regulatory burdens' (Gowers 2006:74). To this end it is submitted that he has thoroughly misunderstood the interplay between TPM and permitted exceptions to copyright. Simply put, whilst the creation of the four

<sup>4</sup> This would be permitted by Art.5(2)(c) of Directive 2001/29/EC, the Information Society Directive.

<sup>5</sup> Art.5 of Directive 2001/29/EC.

<sup>6</sup> The Berne Three-Step Test outlines the maximum extent of exceptions to copyright. Under Art.13 of TRIPS, signatories such as the UK agree to 'confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder'.

<sup>7</sup> Art.5(3)(k) of Directive 2001/29/EC.

aforementioned exceptions would undoubtedly be a welcome addition to our copyright corpus, if TPM is employed, as described above in relation to the role of the Secretary of State, we are left with more permitted exceptions that are harder to realise. Whilst streamlining the system may appear to improve this situation, the power ultimately remains in the hands of the 'control men', and our standing before the law remains 'dividual', as Deleuze would have put it, setting no 'precedent' for all to enjoy.

In a similar vein to Gowers' perception that better awareness of TPM and the threat of investigation by the DTI will eventually 'iron out' some of the perceived shortcomings of TPM, or possibly create an 'industry standard', a small subset of TPM academics advocate that we attend to the creation of TPMs that have fair use and permitted exceptions to copyright considerations built into their coded architecture<sup>8</sup>. It is submitted however, for the same reasons cited throughout this paragraph, that such an undertaking will ultimately prove unworkable. It certainly appears that TPM are here to stay, and have been widely accepted by legislatures despite their faults. If the system isn't broken for the 'control men', only a legal sanction can make them change it for the benefit of all.

### **Creative Commons?**

[W]earing badges is not enough, in days like these.

(Bragg 1999)

As a fitting segue between both halves of this chapter, I now wish to briefly discuss Creative Commons<sup>9</sup> licences. 'By developing a free set of licences that people can attach to their content, Creative Commons aims to mark a range of content that can easily, and reliably be built upon...making it simple for creators to express the freedom for others to take and build upon their work' (Lessig 2004:282). These choices establish a range of freedoms beyond the default of copyright law; enable freedoms that go beyond traditional fair use and permitted exceptions to copyright; and most importantly, express these freedoms in a way that subsequent users can use and rely upon them without recourse to legal advice (Lessig 2004:283).

The idea of the contemporary information environment as 'invaded commons' works in the context of the attempts to 'enclose' the commons and exclude others through a radical redefinition of intellectual property rights (Paliwala 2007), and the employment of TPM. It should therefore, be noted from the onset, that not only is content under a Creative Commons licence, inherently TPM free; it provides an

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<sup>8</sup> Such as the implementation of an escrow requirement for technical 'keys' (Loren 2002) (though, if unregulated, it would endanger the whole system (Braun 2003:502)), the imposition of a Non-Commercial Use Levy on media (Netanel 2003:24) (which may prove discriminatory to many users - e.g. those who buy PCs, yet never download music (Craig 2003:358)), and the creation of Digital Rights and Exemptions Management Systems (Maillard 2004:281) (though no computer algorithm, however complex would be able to fully encapsulate the reflexive *ex post* determination of fair use in the U.S. (Loren 2002)).

<sup>9</sup> See: <http://creativecommons.org/>

antithetical counterpoint to it: 'Simple tags, tied to human-readable descriptions, tied to bullet-proof licences, make this possible...These tags are then linked to machine-readable versions of the licence that enable computers automatically to identify content that can easily be shared' (Lessig 2004:282-283).

Despite their best intentions, and desire to work within the confines of the law by creating a legally licensed ethos of sharing, their uptake, however, has proven limited. Apart from a small clique of academics who wear them as a 'badge of honour' on their weblogs; when compared to the BitTorrent filesharing protocol, which accounts for approximately one third of all Internet traffic at any given time, it's easy to see which form of resistance is more effective, albeit one which is distinctively set against the law.

It is also submitted that their best intentions have already been undermined by the industry practices they seek to overturn, through the idea of counter-cultural rebellion I will expound below. Simply put, Creative Commons cannot compete with similar industry practices that do not share the same ethos. For example, very few people know about the free culture ethic of Creative Commons, yet considerably more know that Prince gave his latest album away for free<sup>10</sup> with the Daily Mail Newspaper (yet subsequently sold millions more from the concomitant publicity). As Lessig is quick to attest: 'We don't give the alcoholic a defense [sic] when he steals his first beer, merely because that will make it more likely that he will buy the next three' (Lessig 2004:65). Nonetheless, such enterprises, do serve to blur the distinction between artistic individuals who value the benevolent promulgation of permission-free culture – such as Björk, who will be discussed later in this chapter – and those at the behest of their record label's post-modern marketing strategies.

### **Inventional Discourses: Rhetorical Tropes & The 'Private Property' Paradigm**

No control machine so far devised can operate without words.

(Burroughs 1985:116)

All the elements of corruption and exploitation are imposed on us by the linguistic and communicative regimes of production: destroying them in words is as urgent as doing so in deeds.

(Hardt & Negri 2000:404)

'Discourse - the mere fact of speaking, of employing words, of using the words of others, words that the others understand and accept - this fact is in itself a force. Discourse is, with respect to the relation of forces, not merely a surface of inscription, but something that brings about effects.'<sup>11</sup> To this end we may also observe Hardt & Negri's agreement; 'If communication has increasingly become the fabric of

<sup>10</sup> '[a]s in 'Free Beer'' (Lessig 2004:106).

<sup>11</sup> Foucault in (Davidson 1997:4-5).



production, and if linguistic cooperation has increasingly become the structure of productive corporeality, then the control over linguistic sense and meaning and the networks of communication becomes an ever more central issue' (Hardt & Negri, 2000:404). More simply, Foucault described discourses as 'practices that systematically *form* the objects of which they speak<sup>12</sup>'. Discursive practices, then, can be understood to be techniques utilised by sections of the population to carry out, maintain and perpetuate their specific knowledges and procedures (Dent 2007:150).

After introducing the problematic myth of countercultural revolution as a rhetorical trope of anti-DRM<sup>13</sup> marketing strategies, I will discuss how piracy discourses and the private property paradigm are as important to Control as the sanction-backed threat of legal action. In discussing these 'Inventional Discourses'<sup>14</sup> of Control, I seek to offer not only a level of definitional clarity, but analogies that seek to bring about different *effects* to those currently envisaged by those who seek to employ Control-Communications-Discourse as a tactic to their own end.

### A Nation of Rebels?

I thought I could organise freedom,  
How Scandinavian of me.  
You sussed it out, didn't you?

(Björk 1997)

One of the most vociferous opponents of DRM to emerge from *within* the 'industry' is Apple Inc. CEO Steve Jobs. In a recent 'post' on the company website, Jobs evokes an open-source utopia; asking us to:

'Imagine a world where every online store sells DRM-free music encoded in open licensable formats. In such a world, any player can play music purchased from any store, and any store can sell music which is playable on all players. This is clearly the best alternative for consumers, and Apple would embrace it in a heartbeat.'

(Jobs 2007)

Lest we forget Steve Jobs' 'world' has always centred on consumers' desires: his 'secret weapon is his ability to meld technical vision with a gut feel for what regular consumers want...as if he were a particularly hip and plugged-in friend' (Burrows, Grover & Green 2006). Jobs is all too aware 'that in the fickle world of the teen and twenty-something marketplace, getting labelled 'the Man' could easily spell an end to

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<sup>12</sup> (Foucault 1972:49 *emphasis added*).

<sup>13</sup> NB: departure from TPM intentional.

<sup>14</sup> A titular amalgam of Foucault's 'Discourse', and 'Inventional Resources,' a term referred to by rhetoricians to describe the most effective tropes of their rhetorical 'toolkits'.

your product's popularity' (Harold 2007:XVI). To this end, the marketing maven - who infamously told his inaugural Apple executive 'the [current] products SUCK!' (Burrows, Grover & Green 2006) - could be defiantly described as somewhat 'down-with-the-kids' for a multi-billion-dollar-quinquagenarian. Since his epiphany that what his demographic really want is a sexy bit of hardware that indirectly endorses illegal file-sharing - enabling him to profit from the music industry's misery - he was simultaneously aware that his denunciation of DRM 'is not a threat to the system - it is the system' (Heath & Potter 2004:4). Most simply put, our love of all things 'alternative' produces 'cool' assets, which capitalists such as Jobs want desperately to add to their holdings<sup>15</sup> (Harold 2007:XX), or as Hardt & Negri would put it; 'Postmodern marketing recognizes [sic] the difference of each commodity and each segment of the population, fashioning its strategies accordingly (Hardt & Negri 2000:152). From this basic theorisation, namely one Heath and Potter have called 'the myth of counter-cultural rebellion', it becomes apparent, that in societies of Control, there is even a market for DRM-dissenters, ripe for exploitation.

'The rub' - as he perceives it - 'comes from the music Apple sells on its online iTunes Store' (Jobs 2007). 'Since Apple does not own or control any music itself, it must license<sup>16</sup> the rights to distribute music from others, primarily the 'big four' music companies: Universal, Sony BMG, Warner and EMI. These four companies...were extremely cautious and required Apple to protect their music from being illegally copied' (Jobs 2007). Portraying himself as yet another victim of the hegemonic quartet - those who control the distribution of over 70% of the world's music - we should, at least, be thankful 'Apple was able to negotiate landmark usage rights at the time, which include allowing users to play their DRM protected music on up to 5 computers and on an unlimited number of iPods' (Jobs 2007).

For Jobs, the underlying problems with DRM are twofold, initially stemming from what he perceives as an inherent hypocrisy within the industry:

'Though the big four music companies require that all their music sold online be protected with DRMs, these same music companies continue to sell billions of CDs a year which contain completely unprotected music...No DRM system was ever developed for the CD, so all the music distributed on CDs can be easily uploaded to the Internet, then (illegally) downloaded and played on any computer or player...In 2006, under 2 billion DRM-protected songs were sold worldwide by online stores, while over 20 billion songs were sold completely DRM-free and unprotected on CDs'

(Jobs 2007)

Sony's Rootkit TPM aside, this logic appears to arrive from a misguided belief that the CD market presents relative stability: that online distribution models are not

<sup>15</sup> 'Napster itself still exists. In what seems like a bizarre twist, Bertelsmann, one of the big five [at the time of writing] music industry firms, bought Napster during the case' (Claude 2002:244).

<sup>16</sup> In the same way other megacorporations like Microsoft and Monsanto 'licence' their IP, conveniently eschewing the problematics of post-sale 'alienation.'

supplanting the industry's monopoly hold on traditional distribution channels with a new norm – they are only surplus to it. Were it not for this inherent hypocrisy, everything would be rosy, 'with each manufacturer competing freely with their own 'top to bottom' proprietary systems for selling, playing and protecting music' (Jobs 2007)

The problem with proprietary systems of DRM and digital content delivery leads us to Jobs' second bone of contention:

'[T]he technical expertise and overhead required to create, operate and update a DRM system has limited the number of participants selling DRM protected music. If such requirements were removed, the music industry might experience an influx of new companies willing to invest in innovative new stores and players'

(Jobs 2007)

Here he is eluding to what others have already described as a technological 'arms race', albeit one he downplays - neither as an unnecessary economic burden on top of near zero transaction costs ultimately borne by consumers; nor as competitive 'dog-eat-dog' – but as an inevitable game of 'cat-and-mouse' (Jobs 2007). As he eludes further:

'Apple, Microsoft and Sony all compete with proprietary systems. Music purchased from Microsoft's Zune store will only play on Zune players; music purchased from Sony's Connect store will only play on Sony's players; and music purchased from Apple's iTunes store will only play on iPods'

(Jobs 2007)

Here, one cannot help but succumb to Jobs' simple logic. When the 'market' for MP3s is as volatile as it is at present, facing more than fair competition from illegal file-sharing, it is inevitable as a game of cat-and-mouse that DRM will be circumvented, how could a DRM arms race ever seem like a sound business investment? However, what gets lost in this rhetorical trope is that the aforementioned Apple, Microsoft and Sony stand to lose very little from the sale of songs, yet have everything to gain in the sale of hardware players. Jobs' 'all or nothing' stance on DRM (ditch them all, or keep it proprietary) matters not when that \$7 to \$74 share increase shows you sell the sexiest player on the market. When EMI<sup>17</sup>, the first of the big four to pursue a little 'alternative cool' announced its intention to align its proprietary system with Apple's iTunes, Jobs undoubtedly stood to benefit from the deal. On the flipside however, when Warner recently followed suit, choosing to hedge its bets with Amazon<sup>18</sup> instead

<sup>17</sup> EMI press release: <http://www.emigroup.com/Press/2007/press18.htm> - Archived by WebCite® at <http://www.webcitation.org/5g3D2VloP>

<sup>18</sup> As of the 27<sup>th</sup> of December 2007 Amazon received a licence to supply Warner DRM-free MP3s enabling customers to play their music on virtually any personal digital music capable device - including PCs, Macs, iPods, iPhones, Zunes, Zens - and to burn songs to CDs for these customers' personal use.

of iTunes, Jobs' wasn't losing any sleep (he may not be selling the tracks, but at least they work on the iPod and iPhone). Until the playing field has been levelled it appears he isn't prepared to help his competitors achieve his vision of interoperability: 'Apple has concluded that if it licenses FairPlay to others, it can no longer guarantee to protect the music it licenses' (Jobs 2007). While the major music labels were initially excited by the possibilities opened up by Apple's iPod, 'they're now leery that Jobs has pulled a fast one. Apple reaps billions from selling its hit music player, but there are sparse profits from the songs being sold over the Net' (Burrows, Grover & Green 2006). This sentiment is echoed in a Financial Times article published the day after Jobs' uploaded his open letter: '[m]usic companies have long complained that Apple has reaped the majority of the benefit of online music through sales of its iPod device, while the music that fuels it is either traded illegally or under-priced' (Chaffin, Allison, Edgecliffe-Johnson & Ibison 2007).

One, however, should not be duped by Jobs' rhetoric, and his ruse. That very same day, Torgeir Waterhouse, senior adviser to Norway's Consumer Council, said Mr Jobs was 'pushing the ball as far away from himself as he can', suggesting one of his real motives was to defuse legal problems in Europe<sup>19</sup> (Chaffin, Allison, Edgecliffe-Johnson & Ibison 2007).

A second, more problematic trope of Jobs' is his assertion that the *raison d'être* of DRM is to 'prevent illegal copies' (Jobs 2007). As I have already submitted, this appropriates 'piracy' rhetoric, disacknowledges the fact that there may be a non-illegal copy, and is emblematic of DRM's bigger picture: namely, taking away traditional fair use privileges and selling them back to you as value-added freedoms/permissions<sup>20</sup>. Scratch beneath the veneer of Jobs' 'rebellion' and you will find EMI remains committed to the deployment of 'DRM as appropriate to enable innovative digital models such as subscription services (where users pay a monthly fee for unlimited access to music), super-distribution (allowing fans to share music with their friends) and time-limited downloads (such as those offered by ad-supported services)'<sup>21</sup>. The exclusive EMI licence provides iTunes the monopoly sale of 'premium downloads'<sup>22</sup>. What's the premium you may ask? Whilst EMI purport the 'premium' to be 'DRM-free audio format of their choice in a variety of bit rates up to CD quality'<sup>23</sup> – aka space-shifting and decent compression: US courts have already held that 'space-shifting' your CDs to a portable music device is fair use<sup>24</sup> – this author purports otherwise, submitting the real 'premium' is revealed in the price bands:

<sup>19</sup> As I will explore further in this chapter, we could say that various responses to DRM and piracy from Scandinavia in general, does indeed present them as a 'nation' of rebels.

<sup>20</sup> As Campbell & Picciotto have already stated, DRM employment provides 'the power to control (and therefore charge) for access, or pay-per-view' (Campbell & Picciotto 2003:285), and 'leaves the defining cultural experience anticipated by digital copyright law as a peculiarly limited property-fee extraction relation' that 'takes priority over all other social relations' (Bowrey 2005:128).

<sup>21</sup> EMI press release: <http://www.emigroup.com/Press/2007/press18.htm> - Archived by WebCite® at <http://www.webcitation.org/5g3D2V1oP>

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Recording Industry Association of America v. Diamond Multimedia Sys.*, 180 F.3d 1072 (9th Cir. 1999).

'AAC format tracks available from EMI artists at twice the sound quality of existing downloads, with their DRM removed, at a price of \$1.29/€1.29/£0.99. iTunes will continue to offer consumers the ability to pay \$0.99/€0.99/£0.79 for standard sound quality tracks with DRM still applied...Consumers who have already purchased standard tracks or albums with DRM will be able to upgrade their digital music for \$0.30/€0.30/£0.20 per track.'<sup>25</sup>

Whilst Jobs may believe '[s]elling digital music DRM-free is the right step forward for the *music industry*', (Jobs 2007 *emphasis added*) his stance may prove somewhat hypocritical, given that he also has a vested interest in one of the world's largest *motion-picture* companies<sup>26</sup>, and a concomitant fiduciary responsibility to protect company assets (Burrows, Grover & Green 2006). Whilst sales of Disney content on iTunes have done a lot to improve things for the floundering company, Preston Padden, executive vice president for government relations remains convinced Disney's recent successes in online offerings have happened largely because of DRM<sup>27</sup> (Kapustka 2007). It appears then, that only half of Jobs' intentions are worn on his trademark turtleneck's sleeve. Again, Jobs envisions a similar fair-use extortion with digital motion picture content to that previously encountered with music, courting Hollywood with proposals to create 'premium' versions of DVDs that include a copy of the movie that can easily be put on a video iPod. Fox has tried this already, with a version of 'Die Hard 4' that costs \$3 or \$4 more than an ordinary DVD' (Hansell 2007). Now Jobs wants to re-sell you a space-shifting privilege, given that the DMCA makes this kind of extortion possible<sup>28</sup>.

Heath & Potter's myth of countercultural rebellion is illustrative of a rhetoric of Control that, always appears to be anticipatory of resistance – as a marketing strategy that is always one step ahead of the dissent. To this end, one wonders whether actors like Steve Jobs, know more about Foucault and Deleuze than those pursuing active resistance. When viewed holistically, Foucault's critical tome could easily serve as a 'manual' of power-relations, and proven modes of domination and subjectification. As Hardt & Negri attest; 'Postmodernism is indeed the logic by which global capital operates. Marketing has perhaps the clearest relation to postmodernist theories, and one could even say that the capitalist marketing strategies

<sup>25</sup> EMI press release: <http://www.emigroup.com/Press/2007/press18.htm> - Archived by WebCite® at <http://www.webcitation.org/5g3D2VloP>

<sup>26</sup> As one of the thirteen board members, and largest single shareholder of Walt Disney Co., a position obtained through a \$7.4 billion stock option acquisition of Pixar Animation Studios, where Jobs was chairman, CEO, and 50.6% owner.

<sup>27</sup> Given that the cost of excludability is considerably lower than policing cinemas. See, e.g. 'With the release of Disney's latest cartoon, Finding Nemo, the studio has reportedly resorted to using metal detectors and night-goggles to catch pirates intending to record the show using concealed digital cameras' (Craig 2003:356).

<sup>28</sup> As we have already observed, this may prove less problematic for US citizens who have a clear 'right' to space-shift DVDs, but may prove more problematic for European citizens, who only have such a 'right' in relation to computer software.

have long been postmodernist, *avant la lettre*' (Hardt & Negri 2000:151).

To take another example of corporate endeavours to commodify dissent, we can cite Negativland's 'Dispepsi,' an album that uses a 'bricolage' of Pepsi and Coke advertisements, creating something entirely new by way of a fragmentary transformation of the existing work. When Pepsi's response inevitably came it was not the legal sanction Negativland envisaged. In fact the company rather enjoyed the new found 'bad' publicity, which, as the common adage attests, is always of benefit in being publicity *per se*. Instead of the legal battle they were anticipating, Negativland were offered an enormous amount of money to do to Miller Genuine Draft's back catalogue of adverts what they had just done to the soft-drink manufacturers' for free. Negativland ultimately refused the offer, but to this day, continue to reel from the knowledge that their attempt at subversion struck other corporations as a great promotional ploy<sup>29</sup>.

Returning to Séverine Dussollier's evocative description of Björk as an 'on-demand service' we can note that Björk is actually proud to sell 'High-Quality DRM-free' tracks on her website, and as part of her longstanding 'Armies of Me' project<sup>30</sup>, openly endorsing independent re-mixing of her music. However, in light of Steve Jobs' desire to free-ride on the publicity goodwill of such honourable intentions, it becomes increasingly difficult to differentiate between genuine counter-DRM rebellion and commodified dissent. Sticking with this line of analogy, we may also observe, that Jobs has already done Björk a disservice when iTunes preempted Universal's release date of her new album 'Volta' by two weeks, offering poor quality AAC to MP3 track-conversions in the process<sup>31</sup>.

## Hakim's Bay

They vilify us, the scoundrels do, when there is only this difference, they rob the poor under the cover of law, forsooth, and we plunder the rich under the protection of our own courage. Had you not better make then one of us, than sneak after these villains for employment?

When the captain replied that his conscience would not let him break the laws of God and man, the pirate Bellamy continued:

You are a devilish conscience rascal, I am a free prince, and I have as much authority to make war on the whole world, as he who has a hundred sail of

<sup>29</sup> See: [http://www.negativland.com/news/?page\\_id=22](http://www.negativland.com/news/?page_id=22) - Archived by WebCite® at <http://www.webcitation.org/5g3DtcPdA>

<sup>30</sup> 'Here are mixes that through creative force of nature unpredictably started flooding my website. I then redirected this positive wave to children who had suffered when a destructive force of nature unpredictably flooded their way. Björk' <http://unit.bjork.com/specials/aom/> - Archived by WebCite® at <http://www.webcitation.org/5g3EPtmEY>

<sup>31</sup> See: <http://idolator.com/tunes/leaks/itunes-accidentally-flips-bjorks-switch-255243.php> - Archived by WebCite® at <http://www.webcitation.org/5g3EZcD8e>

ships at sea, and an army of 100,000 men in the field; and this my conscience tells me: but there is no arguing with such snivelling puppies, who allow superiors to kick them about deck at pleasure.

(Daniel Defoe, cited in Bey 1991)

As we discussed during our meeting, it is certainly not in Sweden's best interests to earn a reputation among other nations and trading partners as a place where utter lawlessness with respect to intellectual property rights is tolerated. I would urge you once again to exercise your influence to urge law enforcement authorities in Sweden to take much-needed action against The Pirate Bay<sup>32</sup>.

In Hakim Bey's '*TAZ: The Temporary Autonomous Zone, Ontological Anarchy, Poetic Terrorism*' the author reveals an ongoing endeavour to write a genealogy of 'Pirate Utopias', observing that Daniel Defoe, writing under the pen name Captain Charles Johnson, wrote what became the first standard historical text on pirates, *A General History of the Robberies and Murders of the Most Notorious Pirates* (Bey 1991). As Bey attests in his observations; 'It is simply wrong to brand the pirates as mere sea-going highwaymen or even proto-capitalists, as some historians have done. In a sense they were 'social bandits,' although their base communities were not traditional peasant societies but 'utopias' created almost *ex nihilo in terra incognita*, enclaves of total liberty occupying empty spaces on the map. One wonders in this sense, what Bey would make of The Pirate Bay, Sweden's *enfant terrible* of peer-to-peer filesharing<sup>33</sup>. How Disney's desire to prevent 'Pirates of the Caribbean' from becoming 'pirated' booty is so strikingly at odds with The Pirate Bay's desire for a new utopian enclave. In similar enterprise to the historians who have oft-misunderstood the pirates of yesteryear, 'piracy' in its modern parlance is a term reserved for any 'social bandit' *per se* who partakes in illegal file-sharing, when really, it ought be best reserved for those who undertake copyright theft as a form of criminal enterprise. Once again, there also appears to be a certain hypocrisy in forgetfulness

In spite of the misguided use of 'piracy' discourse, The Pirate Bay are unashamed to call themselves Pirates, yet in the very different sense of the word Bey urges us to comprehend. Having learnt valuable lessons from the Napster and Grokster decisions – that any knowledge of illegal filesharing on a central server will ultimately

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<sup>32</sup> Fax from Motion Picture Association of America to Swedish Secretary of State, Dan Eliasson: [http://torrentfreak.com/images/pirate\\_mpa.pdf](http://torrentfreak.com/images/pirate_mpa.pdf) - Archived by WebCite® at <http://www.webcitation.org/5g3EfnKHP>

<sup>33</sup> 'My intuition however suggests that the counter-Net is already coming into being, perhaps already exists--but I cannot prove it. I've based the theory of the TAZ in large part on this intuition. Of course the Web also involves non-computerized [sic] networks of exchange such as samizdat, the black market, etc.--but the full potential of non-hierarchic information networking logically leads to the computer as the tool *par excellence*. Now I'm waiting for the hackers to prove I'm right, that my intuition is valid' (Bey 1991), x-ref 'I define a hacker as an individual who experiments with the limitations of systems for intellectual curiosity or sheer pleasure; the word describes a person with a particular set of skills and not a particular set of morals' (Schneier 2002:43).

invalidate a 'mere conduit' defence before the courts – The Pirate Bay operate in a manner that facilitates mass file-sharing through the provision of a free BitTorrent tracking service, that is in tactful compliance with current legal precedent. 'We have one server that is in front of all our other servers, and that's in Sweden', says Peter Sunde, Administrator of The Pirate Bay; adding that the organisation doesn't know where most of its servers are. 'If you found our main server and unplugged it, you couldn't find the others' (Bradbury 2007). The system has been organised in such a way, that none of The Pirate Bay's founders know where all the servers are, nor could they find them if they wanted to. In an attempt to set up a TAZ, or Pirate Utopia of their own, you may not be surprised to hear The Pirate Bay are saving for a Caribbean Island, after their prior intention to buy 'Sealand,' an ex-military platform, and independent principality six miles off the coast of Harwich. In a somewhat strange twist of post-Grokster fate, use of the BitTorrent protocol for file-sharing has become so ubiquitous, and difficult to Control, companies specialising in countermeasures to peer-to-peer piracy, like MediaDefender, have been injecting fake files into the network to try to make BitTorrent too tiresome for people to use (Bradbury 2007). As a paradigm example of such attempts at Control-Communication-Etymological Experimentation, we can observe such tactics as an attempt to install 'friction' into a system that shows no sign of disappearing. A high profile example of this was the innovative use of explicit language by Madonna. Anyone downloading one of the decoy tracks distributed on the Internet file swapping services would have got a bit of surprise when instead of hearing Madonna's latest album 'America Life' they heard her saying 'what the f\*ck do you think you are doing?' However, guerrilla tactics such as these are not without their risks. The response to this tactic was for a free music advocate to pick up the virtual gauntlet and hack into Madonna's website to offer free downloads of her album to visitors to the site (Craig 2003:358).

Of course the music industry is quite adept to using piracy discourse to promulgate a per-copy mode of recompense. It is this feature of copyright policy which allows music industry lawyers to argue for the absurd proposition that every copy of a song downloaded for free using peer-to-peer networks represents a 'lost' sale (Ganley 2004:317). In 1997, the Business Software Alliance had a counter on its Web page that charted the industry's losses due to piracy: \$482 a second, \$28,900 a minute, \$1.7million an hour, \$15 billion a year. These numbers were inflated, since they make the assumption that everyone who pirates a copy of Autodesk's 3D Studio Max, for example would have otherwise paid \$2,995 (Schneier 2000:25). It is submitted that this argument remains the keystone of the music industry's attack on copyright infringement, making its argument for the unequivocal protection of all-encompassing TPM, economically untenable. As we shall observe below, perhaps an air of unanimity between those who argue file-sharing is the natural law of the Internet, and the natural laws of economics can help reconcile the issue at hand.



### When You Pirate MP3s, You're Downloading *Economics*

People have a right to share copies of published works.

(Stallman 2006)

According to conventional economic theory, goods with zero marginal costs should be public goods to be given away without cost rather than be sold as a commodity.

(Perelman 1998:89)

The title of this sub-chapter, is a play on an anti-RIAA poster currently swarming the Internet. 'When you Pirate MP3s, You're Downloading Communism' the poster proclaims, and has recently been detourn  d to declare: 'When you pay for MP3s, You're Rockin' Out with The Man'. Whilst IP rightholders have succeeded in successfully bringing an end to the previously radical utopias of Napster and Grokster, they have been unable to thwart its underground offspring - the BitTorrent protocol, which accounts for roughly one third of all Internet traffic at *any* given time. Whilst the copyright industries continue to assert their belief that downloading is illegal, ringing this point home with some exemplary court cases, distributed file-sharing networks have become too pervasive to police effectively. As a result the UK Government has recently announced plans to ban persistent peer-to-peer file-sharers from the Internet altogether (three strikes and you're out!), in a similar vein to the 'communications' ban placed upon notorious 'hacker' Kevin Mitnick upon his release from solitary confinement. Kevin Mitnick got (and served) almost five years, and was prohibited from using a computer for another three. (All his skills are related to computers, and he has been prohibited from lecturing on the subject (Schneier 2000:382)). The Government proposed policing of peer-to-peer file-sharing will not be undertaken at the corporation's expense - ISPs will have to monitor subscribers' internet use and give users two chances before disconnection. They will be emailed once, suspended a second time and then cut off completely if they do not change their file sharing behaviour<sup>34</sup>

In response to the hard-line advocates of 'downloading is illegal' a cyberactivist/libertarian response is often found emanating from the peer-to-peer community, drawing support from the likes of John Perry Barlow (former lyricist for the Grateful Dead turned political activist) and Richard Stallman (pioneer of the concept of 'copyleft' software, and main author of several copyleft licenses including - the most widely used free software license - the GNU General Public License) such responses normally argue that copying is the 'natural law of the Internet' and that we have a 'right' to share copies of published works. Whilst it remains true that the Internet is - in its very nature - a distributed copying machine - one that facilitates acts of mass copyright infringement - in the face of legal arguments to the contrary, the cyberactivist attempting to argue for a hypothetic right inevitably gets tagged a

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<sup>34</sup> See: [www.out-law.com/page-8868](http://www.out-law.com/page-8868) - Unable to archive.

communist. It becomes hard to argue for theft, and harder still when the industry gets its minions to do its bidding - 'Would you go into a CD store and steal a CD? It's the same thing, people going into the computers and logging on and stealing our music. It's the exact same thing, so why do it?'<sup>35</sup> Why do it, indeed Britney? The cyberactivist may still feel it is his right to do so, but where does this 'right' find its validity? Where should the natural law of the Internet seek its legitimacy? In the natural law of *economics*, silly!

Economics - in its modern parlance - concerns itself with the allocation of *scarce* or *rivalrous* resources. Intangible property is non-rivalrous - whereas tangible property is inherently rivalrous. For example, take this thesis firmly in your hand. It is inherently rivalrous - a scarce resource because only one person can read your copy at any given time. It cannot be in two or more places at once, yet MP3s, on the contrary, are inherently non-rivalrous. A copy of an MP3 can be in more than one place at any given time, coursing through the capillaries of the Internet without depriving the original owner of their 'copy'. To Britney's questionable logic, Stanford Law professor Lawrence Lessig offers a fine retort: 'if you go into Tower Records and you pick up a CD and walk out you might be chargeable with a misdemeanour, probably a \$1,000 fine. According to the RIAA, if you download the same songs off the Internet you could be liable for \$1.5 million and damages...which one is the really harmful activity? Taking from Tower Records actually deprives Tower Records of some money. But downloading from the Internet, its [sic] arguable whether it harms anybody'<sup>36</sup>.

This is the crux of the radical economic argument I wish to put forward, although Lessig does not take it to its logical conclusion. The natural law of economics - supported by Nobel Economic Laureates Kenneth Arrow and Paul Samuelson - dictates that goods with zero marginal costs should be public goods to be given away without cost rather than be sold as a commodity. Simply put, when the marginal cost (the cost of producing one additional unit) nears zero, the good - whatever it is - should be given away for free. Here - you may be surprised to hear - rational economic man advocates the giving away of MP3s, given that the cost of copying one additional unit is near zero (arguably only an unquantifiable amount of electricity is required to copy an MP3, given that you already own the computer required to copy it). If it costs the industry near-zero to make that unit, then it costs them near-zero if you steal it. Of course, this is of no surprise to the cyberactivist, railing against industry over-inflation of that near-zero marginal cost, inability to adjust to the online-market, and their desire to protect the totalitarian distribution networks they have monopolised since the 1960s. Of course, these vast distribution networks are of no use to the new distribution network we affectionately call the Internet. There are no more Tower Records from which to take. Economics dictates that the reduced marginal cost of delivering music online permits the Recording Industry to charge somewhere between 0-5p a track. Any more is just naked profiteering, and requires a

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<sup>35</sup> Britney Spears: 'What the Artists and Songwriters Have to Say,' Musicunited.org, 2003 cited in Punk Planet, Issue 74, July & August 2006.

<sup>36</sup> Punk Planet, Issue 74, July & August 2006.

sympathetic legislature to protect industry self-interest. Alas, as Michael Perelman observes: 'when the sacred laws of economics suggest something that might not be in the best interests of business, economic theory is swept aside' (Perelman 2002:185), and law, *read* government, *read* business, becomes the real root of the problem, and market populism – the belief that markets are more democratic than anything else – reigns supreme.

It is no longer a case of 'us' against the 'industry', if 'we' have the economists on our side. Whilst 'we' - *the file-sharing multitude* - radically endorse economic law in our active resistance, the economists invest legitimacy in our 'right' to share copies. We are not pirating MP3s...we're downloading economics.

### The Private Property Paradigm

At the time of the birth of the modern system of IPRs, as part of the transition to industrial capitalism in the late 18th and first part of the 19th century, the new private property paradigm was a struggling infant. Now it is a lusty giant, blocking the pathways of development of today's technologies.

(Campbell & Picciotto 2003:292)

It is submitted that the private property paradigm poses one of the most problematic discourses for modern IP law. There is nothing natural or Locklean about IP rights<sup>37</sup>. As I have already discussed above, IP is inherently non-rivalous. We do it a grave injustice to inevitably analogise it with tangible property, which we, in a somewhat Locklean manner assume is a natural right to private property. The point that must be perpetually borne in mind is that there is nothing natural in *all* property rights, be it in tangibles or intangibles. As Campbell & Picciotto strive to remind us, all property rights are social constructions. Whilst you may feel you have a right to tangible property, such as land, this right in itself remains a social construct based on the premise that in the hands of a few actors it will be put to better use than as a common treasury for all. Whilst it is obvious to assert that tangible property is inherently scarce, and that intangible property such as IP requires the artificial creation of scarcity, we fall victims of discourse when we inevitable analogise IP with a natural right to tangible property.

To take Campbell & Picciotto's erudition further, and apply it to current inventional discourses pertaining to TPM, I wish to further pursue their critique of Kenneth Dam, 'who inevitably analogises technological protection with the locking up of private property' (Campbell & Picciotto 2003:299). It is submitted, that such analogies have become a bone of contention in the course of undertaking this thesis. Simply put, many of the scholars broaching the subject of DRM and TPM lack a firm grasp of what it is they are talking about. Hopefully, you will have already picked up

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<sup>37</sup>'Only one thing, is impossible for God: to find any sense in any copyright law on the planet' Mark Twain 1835-1910: notebook 23 May 1903.

on a few of these in chapter four, the critique of which I have left until now to illustrate just how pervasive they are. Whilst there are too many different descriptions and analogies to cite in this thesis, a few will be highly illustrative.

Digital Rights Management, to start with, inevitably promulgates the natural 'rights' discourse of the private property paradigm, and might be better described, as some academics attest, as 'Digital Restrictions Management' in the sense that it seeks restriction to the point of totalitarian exclusion. The ISP Verizon has also reduced it into the acronym 'Doesn't Really Matter' in an attempt to highlight the futility of its employment. It is submitted that DRM is best viewed as a toolkit, or a portfolio of tactics, that include TPM, RMI, and Click-Wrap Contracts. Yet many scholars regard DRM and TPM as interchangeable terms. Given their relationship to copyrighted material, affiliation with the private property paradigm becomes essential if the discourse is to have full effect. I have tried my utmost to locate the specific etymology of DRM, and have regrettably failed. I do however, believe it to have emanated from 'business talk', and believe it to be somewhat otiose that from a statutory language that deals exclusively with TPM, DRM should prevail as the widely accepted parlance. For a number of reasons, it is submitted that reference to TPM is preferential to DRM. Firstly, the 'rights' adjunct of DRM undoubtedly perpetuates the private property paradigm, as I have already discussed. In contrast, the legislation-specific use of TPM doesn't refer to much other than the use of technology to protect. In so doing we may come to not only affiliate the 'T' with Foucauldian 'technology', but ultimately come to view TPM as more concerned with the bigger picture of 'situational crime control' and 'problem-oriented-policing' than exclusively copyright-related. Third and finally, I wish to advocate the use of TPM over DRM as a means of doing away with the notion that TPM is a distinctly late-modern phenomenon brought about by digitisation, once and for all.

Quite ironically, Kenneth Dam's approach, in referring to TPM as a form of Self-Help is quite enlightened, and less deserving of critique than most. As some scholars have no qualms with referring to DRM as a copyright-related concern, such as Jonathan Zittrain, who regards it as a technological *complement* to copyright (Zittrain, 2005)), and others who refer to it as para-copyright, it is interesting to observe that only Stanford Law professor Paul Goldstein refers to it as 'anti-copyright law', on the premise that it challenges the intrinsic principle of copyright, namely, 'that the rule of law is a fairer and more efficient means for protecting literary and artistic works than are physical barriers' (Goldstein 2003:175).

## 6 Waiting For The Great Leap Forwards

### A Forgone Conclusion

You can be active with the activists  
Or sleep in with the sleepers  
While you're waiting for the Great Leap Forwards.

(Bragg 1988)

Critique doesn't have to be the premise of a deduction which concludes: this then is what needs to be done. It should be an instrument for those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal. It doesn't have to lay down the law for the law.

(Foucault 'Questions of Method' in Burchell *et al.* 1991:84)

It is submitted that the main thrust of this conclusion of sorts - in endeavouring to make this thesis as Foucauldian as possible, both stylistically and critically - is a desire to avoid the pitfalls of 'reformism'. Simply put, it has not been my intention to 'lay down the law for the law', but to offer a framework for analysis, and investigate relevant points of attachment that vitalise academic scholarship pertaining to TPM and copyright law. Unsurprisingly, a similar sentiment is proffered by Deleuze: 'It's not a question of worrying, or of hoping for the best, but of finding new weapons' (Deleuze 1990:178). If at times this thesis has appeared a little lacking, I request that it be viewed as a sincere undertaking to grapple with a lot of distinct theories and practices I perceive as pertaining to the fullest possible analysis of the co-evolution of TPM and copyright. As Garland observes: 'The criticism that an approach 'doesn't deal with everything' is not a particularly damaging one. All analytical frameworks are partial, and there is much to be gained from specificity and targeting of enquiry' (Garland 1997:204). In so doing it has been my analytic intention to isolate contingencies, rationalities and technologies, and investigate the forms of power-relations, discourse and subjectivity, as they pertain to TPM.

By way of a foregone conclusion I would, therefore, like to reassert the ways in which a Deleuzo-Foucauldian framework for analysis vitalises legal scholarship pertaining to copyright and TPM. The central preoccupation of this thesis is a call to redress an imbalance in legal scholarship pertaining to TPM. Legal and technological determinism infects many critical analyses of the legal environment of our digital future (Bowrey 2005:140). Viewed through the objective lens of evolutionist history, such analyses promulgate the belief that new technologies, necessitating the enactment of new laws, have thrown copyright law into a state of crisis.

Taking my cue from the philosophers Gilles Deleuze, and Michel Foucault I have argued that every society has its diagram[s]. We should not misread Foucault, as a public intellectual primarily concerned with mapping the tree-like, societal power-relations of Sovereignty, and Disciplinaryity: shortly before his death, he began grappling with a third societal diagram looming menacingly on the horizon. Further elaborated upon by Deleuze, it has been submitted that this rhizomic, distributed diagram bears a prescient resemblance to Manuel Castell's 'network society', and the biggest 'ginger root' of them all: the Internet.

Applying an inventive Deleuzo-Foucauldian analysis to copyright law yields many insightful results. Through recourse to the method of genealogical enquiry we can begin to articulate a history of our present that is more than evolutionist, and capable of exposing contingencies. Throughout copyright's relatively-short history, Foucault's 'genealogical' method of inquiry can be used to identify two distinct periods of perceived crisis; namely, the advent of the printing-press, and of the Internet. Whilst many commentators hold the technology *du jour* responsible for bringing about these aforementioned periods of crisis, as academics, we must avoid being technologically, and legally deterministic. It has therefore, been somewhat radically asserted, that these two crises have in fact, been brought about by a shift from one societal diagram to another: the former, a shift from 'Sovereignty' (a centralised 'diagram') to 'Disciplinaryity' (a decentralised 'diagram'), and the latter, a shift from 'Disciplinaryity' to 'Control' (a distributed 'diagram'); and that we are now on the edge of a hybrid topography – a tension between two different diagrams.

Regarding the bulk of copyright's legislative corpus as a relic of a past diagram, I have argued that the concept underpinning TPM is a paradigmatic realisation of a Deleuzian reality. 'If our legal system is tottering, is itself breaking down, it's because we're going from one to the other' (Deleuze: 1995:179). It is to this end that TPM can be viewed as a flagship of law enforcement designed to traverse the straits of our new societal diagram. We are tired of trees! We have, for too long, analysed copyright law through the singularity of its decentralised diagram. 'As a result of this, critics have overwhelmingly presumed that the primary battlefields of technology and law are legislatures, global law-making bodies and courts' (Bowrey 2005:140). Instead, we must grapple with the hybrid topography emerging before us, and fathom sense out of the rhizome roots *and* the trees. To this end, it is submitted that the interplay between TPM and law is the best battlefield upon which to begin. We must 'establish the basic sociotechnological principles of control mechanisms as their age dawns, and describe in these terms what is already taking the place of the

disciplinary sites of confinement that everyone says are breaking down' (Deleuze 1995:182). After presenting TPM as a paradigmatic way of effecting the 'Control' envisaged by Deleuze, Foucault's third 'Technology of Power', and Deleuzo-Foucauldian architectures of control, we can observe how TPM represents a technology of self-modulation, and how TPM can be better viewed as the situational crime control and/or problem-oriented policing of a built architecture (that is not necessarily digital).

We must then return to the trees, and question the way our emerging, distributed societal diagram has affected the role of law. Here we can observe that, as some Foucauldian scholars would have us disbelieve; the role of law is neither expelled, nor superseded: its role and nature merely changes. As my analysis of law on the books, in chapter four, attests, the role of law has been relegated to protecting TPM employment *per se*, and through the enactment of anti-circumvention legislation, the state has shown a clear intention to 'abdicate' a large proportion of the juridical role of deciding on permitted exceptions to copyright and fair use to private enterprise. As we have also observed in chapter four, this legislation protects a technological form of situational crime control under the guise of copyright law; business models capable of enforcing economic acquiescence to the extraction of micro-payments; and presents once permitted exceptions to copyright as market failures successfully cured by technology. It can also be viewed as a vessel for preventing the circumvention of anticompetitive business practices. Through further refinement of Foucault's governmental rationalities we can trace the initial formulation of our current governmental *raison d'état*, and the *laissez faire* it affords the market consumption practices and free enterprise TPM are employed to protect.

As I have discussed in chapter five, the effectiveness of having to go 'before the law' to gain access to a work protected by TPM (the Secretary of State in the UK, and the Librarian of Congress in the US); the recommendations of the Gowers Review of Intellectual Property; and the belief that fair use rights and permitted exceptions to copyright infringement can be 'coded' into TPM; are all rendered problematic by a Deleuzo-Foucauldian framework that presents an inherent tension between the distributed diagram through which TPM exercises, and the hierarchical, centralised diagram of juridical rule. A Deleuzo-Foucauldian framework also urges us to consider how discourse and rhetoric, not only affect juridical and legislative processes, but increasingly modulate end-user interaction with copyrighted cultural content. Etymology and discourse are more than titular concerns; they are indicative of attempts to control the parameters of any given debate to an end envisioned by those who use them as an 'inventional resource'. Through an analysis of discourse, we can observe how words and meanings construct practices and perceptions, reinforcing them in a manner often neglected by legal analysis.

Furthermore, as I outlined in chapter two, such a framework may prove not only insightful for scholarship pertaining to TPM and copyright, but for other interactions between law and 'technology' that targets a global mass of individuals/(data) banks. It is submitted that whilst the genealogy of TPM is certainly in need of a fuller historical enquiry, one could also undertake the provision of a

genealogy of IP. Whilst this would certainly be a monumental endeavour, given its relatively short history, it may bring new observations to this dynamic field, and could be done. In fact, I have to do it.



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# Abbreviations

AAC: Advanced Audio Coding (an audio compression format specified by MPEG-2 and MPEG-4).

Berne: Berne Convention for the Protection of Literary and Artistic Works.

CD: Compact Disc.

CDR: Compact Disc Recordable.

CEO: Chief Executive Officer.

CPU: Central Processing Unit.

CSS: 'Content Scrambling System'.

CTEA: Copyright Term Extension Act (1998).

DAA: Copyright Amendment (Digital Agenda) Act (Australia) (2000).

DAT: Digital Audio Tape.

DMCA: Digital Millennium Copyright Act (1998).

DRM: Digital Rights Management.

DTI: Department of Trade and Industry.

DVD: Digitally Versatile Disc.

EEC: European Economic Community.

ECHR: European Human Rights Convention on Human Rights and Fundamental Freedoms.

ECJ: European Court of Justice.

EU: European Union.

FTA: Free Trade Agreement.

HRA: Human Rights Act (1998).

IFPI: International Federation of the Phonographic Industry.

IP: Intellectual Property.

IPR: Intellectual Property Rights.

ISP: Internet Service Provider.

MP3: an audio compression format specified by MPEG-I Audio Layer 3.

PC: Personal Computer.

RIAA: Recording Industry Association of America.

RMI: Rights Management Information.

SDMI: Secure Digital Music Initiative.

SMD: '*Society Must Be Defended*' (by Michel Foucault).

STP: '*Security, Territory, Population*' (by Michel Foucault).

TAZ: Temporary Autonomous Zone (after Hakim Bey).

TBB: '*The Birth of Bio-Politics*' (by Michel Foucault).

TPM: Technological Protection Measures.

TRIPS: Agreement on Trade Related Aspects of Intellectual Property Rights (1994).

UKIG: Act on Actions for an Injunction (Unterlassungsklagengesetz, UKIG).

UrhG: German Law on the Regulation of Copyright in the Information Society (Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft) (2003).

UK: United Kingdom.

US: United States of America.

VCR: Videocassette Recorder.

VHS: Video Home System.

WCT: World Intellectual Property Organization Copyright Treaty (1996).

WPPT: World Intellectual Property Organization Performances and Phonograms Treaty (1996).

WIPO: World Intellectual Property Organization.